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[These Reports will be cited as follows :—[1916] 2 I. R.]

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CORRIGENDA.

Page 8, for "*Taylor* v. *Smettin*" read "*Taylor* v. *Smetten*".

,, 216, line 11, *for* "sec. 25" *read* "sec. 23".

,, 241, line 9 from bottom, *for* "were confined to" *read* "are reported upon only".

,, 282, line 11, for "*Smithies* v. *Brown*" read "*Smithies* v. *Bridge*".

,, 415, ,, 2 from bottom, for "*Chaplin* v. *Bradley*" read "*Chapman* v. *Bradley*".

,, 469, line 18, *for* "p. 206" *read* "p. 208".

,, 515, *for* reference number "(3)" *read* "(1)".

,, 578, foot-note, *for* "[1898] 2 Ir. R. 1" *read* "[1908] 2 Ir. R. 1".

,, 626, line 12 from bottom, *for* "Where" *read* "When".

,, 629, ,, 4 ,, ,, *for* "of" *read* "or".

MEMORANDA.

On the 15th April, 1916, the Right Hon. John Gordon, His Majesty's Attorney-General for Ireland, was appointed a Judge of the King's Bench Division in Ireland, in the room of the Hon. Mr. Justice Boyd, resigned.

On the 15th April, 1916, the Right Hon. James Henry Mussen Campbell K.C. was appointed His Majesty's Attorney-General for Ireland.

On the 5th May, 1916, the Lord Lieutenant assigned the Right Hon. Mr. Justice Pim to dispose of Bankruptcy business, and the Right Hon. Mr. Justice Gordon to dispose of Admiralty business.

On the 5th July, 1916, the Right Hon. Christopher Palles, Lord Chief Baron, resigned.

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CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1916.

BARRETT, Appellant; FLYNN, Respondent (1).

K. B. Div.
1915.
Nov. 17, 18, 23.

Unlawful Gaming—"House"—Distribution of Prizes by Lot or Chance—Lottery—Gaming Houses Act, 1854 (17 & 18 *Vict. c.* 38), *s.* 4—11 *Anne, c.* 6 (*Ir.*), *s.* 1.

Section 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), enacts that "any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein . . . and any person having the care and management of, or in any manner assisting in conducting the business of any house, room, or place opened, kept or used for the purpose aforesaid" shall, on summary conviction, be liable to a penalty not exceeding £500.

By 11 Anne, c. 6 (Ir.), sec. 1, all lotteries in Ireland are to be deemed to be public nuisances, and a penalty is imposed on persons opening, playing, or drawing at such lotteries.

The president of a workmen's club was prosecuted for having kept open and used the hall of the club for the purpose of unlawful gaming being carried on therein. The game played was called "House." The nature of the game and the manner in which it was played were described as follows:—In a large room off the hall of the club were 100 men, seated on forms at tables. Rectangular leather cards, each containing three horizontal rows with five figures in each row, were distributed amongst the men at the rate of one penny per card. Sometimes as many as forty dozen of these cards were issued in a game. From a box or urn, "the president," the respondent in this case, drew a card and called out its number, whereupon any player upon whose card the number was, crossed that number out with a piece of chalk. The game finished by a player shouting "House," walking up to "the president," and showing him his card, for which he (the player) claimed "House," so claiming from the fact that all the five numbers on one horizontal row were chalked out. In this particular case the winner was handed twenty-seven shillings, one penny to the shilling having been deducted by "the president," for the lighting, &c., of the hall.

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(1) Before Cherry L.C.J. and Madden and Boyd JJ.

Held, that the game of "House" was a lottery, and as such was prohibited by the Lottery Acts, and that the playing of it, whether in public or private, was "unlawful gaming" within the meaning of section 4 of the Gaming Houses Act, 1854.

Per Cherry L.C.J: The game of "House" carried on as described was "unlawful gaming," not only because it was a lottery, but because it was a game of pure chance carried on for a pecuniary profit to the owners of the hall.

CASE STATED by Mr. Swifte K.C., a divisional justice of Dublin, under 20 & 21 Vict. c. 43.

At a sitting of the Dublin Metropolitan Police Court on the 14th May, 1915, William Flynn was charged in a summons, framed under sect. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), for that he on the 4th March, 1915, at 49 Cuffe Street, in the city of Dublin, "(*a*) did unlawfully have the care and management of, and (*b*) did assist in conducting the business of, a certain house, to wit, the Bricklayers' Hall, the said house then being opened, kept, and used for the purpose of unlawful gaming being carried on therein." The complainant was Police Inspector Daniel Barrett.

The case stated by Mr. Swifte was as follows:—

"At the hearing of the said complaint it was proved that the complainant visited the Bricklayers' Hall, 49 Cuffe Street, in the said city of Dublin, on the 4th day of March, 1915, about 10.10 p.m., when he found in a large room at the back of the said hall about 100 men, most of whom were seated at tables, and to whom

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leather cards bearing numbers were being issued. They were rectangular, each bearing fifteen numbers in three horizontal rows, five distinct numbers being in each row. The numbers were all different, and ranged to seventy-five. One James Lightholder (the defendant in another summons heard by me on the same day as that against William Flynn) was engaged in distributing the cards and taking in the money, and the defendant William Flynn, described as 'the president,' was in a small office in a corner of the room, looking after the money, and issuing the cards. He informed the complainant that they had roughly forty dozen of the cards, and that sometimes they were all issued in a game. The complainant saw one game played, the net amount payable to the winner of it being 27*s*. The defendant Flynn informed the complainant that one penny to the shilling received on the game had been deducted for the lighting, &c., of the club. The defendant had a tin can and shook it, pulled out a number on a piece of leather at random, looked at it and shouted it out loudly and distinctly, so that it would be heard throughout the room. Any player on whose card the number was stroked that number out on his card with a piece of chalk. The game finished by a player shouting 'House,' walking up to the president, and showing him his card for which he (the player) claimed 'House,' so claiming from the fact that all the five numbers on one horizontal row were chalked out. The president then checked that off by referring to the numbers he had abstracted from the can and announced to the room. He then handed over the 27*s*. to the winner. That ended the game, which had occupied about five minutes altogether, and all the players handed in their cards. The cards were then distributed again at a penny each, some players taking more than one card. The chalk marks could be wiped off the cards. A second game proceeded at once on the same lines as the first, about 100 men joining in it. There was no other form of amusement provided, except the game of 'House.' There were no newspapers or anything else in the room. One Richard O'Carroll (the defendant in another summons disposed of by me on the same day as the present one) was described as the 'secretary,' and lived on the premises upstairs. The room in which the play went on was on the ground floor. The defendant Flynn, in

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reply to the complainant, stated that the money taken on the game (*i.e.*, the penny in the shilling produced by the sales of the tickets) was used for lighting purposes, &c.

"The complainant was the only witness examined.

"It appeared that the full name of the trade union using the Bricklayers' Hall is 'The Ancient Guild of Incorporated Brick and Stone Layers' Trade Union,' and the 'Head Office, 49 Cuffe Street, Dublin.'

"It was mentioned early in the course of the hearing before me that about five years ago a prosecution against the committee of management of a similar trade union, likewise for carrying on the same game of 'House' at their hall, in Capel Street, in this city, had come on appeal from one of the Dublin divisional magistrates before his Lordship, the present Recorder of Dublin, the summons in that instance being framed under the statute 8 & 9 Vict. c. 109, sect. 4, for keeping a 'common gaming house,' when his Lordship, after hearing counsel on both sides, held that the hall there in question was not a 'common gaming house,' and reversed the magistrate's decision. A newspaper report of the case, apparently accurate, contained in the Dublin *Evening Telegraph* of the 25th day of April, 1910, was furnished to me by the solicitor for the complainant, and as the facts in the two cases were practically identical, I held that I was bound by his Lordship's decision, and so precluded from inquiring in the present summons whether the Cuffe Street hall was a 'common gaming house.' I reserved my judgment, which I delivered on the 4th day of June last, dismissing the summons."

The judgment of the Court was requested as to whether the magistrate was correct in point of law in his determination as aforesaid or as to what should be done in the premises.

The Solicitor-General (*James O'Connor K.C.*) (with him *Rearden*), for the appellants:—

We submit that the Bricklayers' Hall was a common gaming house, and that any game played there was unlawful. A common gaming house is any house, room, or place, kept or used for the purpose of unlawful gaming therein by any considerable number of persons: Stephens' Digest of the Criminal Law, 6th ed.,

p. 143. A common gaming house is a house in which a large number of persons are invited habitually to congregate for the purpose of gaming: *Jenks* v. *Turpin* (1). In support of the allegation that any house or place is a common gaming house it is sufficient to prove that it is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusive of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other persons by whom the game is managed or against whom the other players stake, play, or bet: Gaming Act, 1845 (8 & 9 Vict. c. 109), sect. 2.

Even if the Bricklayers' Hall is not a common gaming house, the game of "House" played therein is an unlawful game, because (*a*) it is a game of pure chance played for money; (*b*) the chances are not alike favourable to all the players, including among the players the person designated "the president"; (*c*) it is a lottery; (*d*) it is played in such circumstances as to amount to a nuisance. If the banker, in this case "the president," makes anything out of the game, whether as the result of chance or certainty, the game is unlawful. It makes no difference that the use of the house and the gaming therein are limited to the subscribers and members of a club, and that it is not open to all persons who might be desirous of using it: *Jenks* v. *Turpin* (1), *per* Hawkins J., at p. 515. "In using the words 'unlawful games' it is clear the legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons." (*Ib.*, p. 516.) Progressive whist played in a room to which admission is by way of ticket for which a charge is made is an unlawful game: *Morris* v. *Godfrey* (2). In that case the chances were equal, and the decision involves that a game of chance is unlawful—where, at least, the owner, as in that case, has a pecuniary profit in getting persons to play: *Donaghy* v. *Walsh* (3), *per* Gibson J., at p. 274. Holding a sweepstake is a lottery: *Allport* v. *Nutt* (4).

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(1) 13 Q. B. D. 505.

(2) 23 Cox, 40.

(3) [1914] 2 Ir. R. 261.

(4) 1 C. B. 974.

The game of "House" is a lottery, and, as such, is unlawful. Both Webster and Johnson, in their dictionaries, define a lottery as "a distribution of prizes by lot or chance," and that definition has been held to be correct for the purpose of construing the Lottery Acts: *Taylor* v. *Smetten* (1). [He also referred to *Munro* v. *Kelly* (2).]

Healy K.C. and *Power* for the respondents:—

The law in this country in regard to gaming is entirely different from the law in England, and practically all the cases cited are based on statutes applicable only to England. The statute 33 Henry VIII, c. 9, never applied to Ireland; and all the English Gaming Acts are founded on that Act.

In Ireland certain named games, and no others, are unlawful, and the game of "House" is not included amongst them.

Rearden in reply:—

The game of "House" is a lottery within the meaning of the accepted definition, namely, "an arrangement for the distribution of prizes by chance amongst persons purchasing tickets." A lottery is declared to be illegal in Ireland by 6 Anne, c. 17, sect. 1; 11 Anne, c. 6, sec. 1; and 42 Geo. III, c. 119; and the game of "House" being a lottery is, therefore, an unlawful game.

Cur. adv. vult.

Nov. 23.

CHERRY L.C.J.:—

This is a case stated by Mr. Swifte K.C., Chief Magistrate of Dublin Metropolis, as to the legality or illegality of a game called "House," which we are told is extensively played in various workmen's clubs in Dublin at the present time.

The summons issued by the prosecutor, an Inspector of the Dublin Metropolitan Police, charged that the defendant, on the 4th day of March, 1915, at 49 Cuffe Street, "(*a*) did unlawfully have the care and management of, and (*b*) did assist in conducting the business of, a certain house, to wit 'The Bricklayers' Hall,' the said house being then opened, kept, and used for the purpose of unlawful gaming being carried on therein."

(1) 11 Q. B. D. 207. (2) 45 I. L. T. R. 179.

The nature of the game, and the manner in which it was played on the occasion in question, are fully set out in the evidence of the complainant, as follows:—

[His Lordship read the evidence as set out *ante*, pp. 2, 3.]

The charge was brought under sect. 4 of the Gaming House Act, 1854 (17 & 18 Vict. c. 38), which provides that "Any person being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein . . . and any person having the care or management of, or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid," shall be liable to the penalties specified in the section.

This Act contains no definition of the phrase "unlawful gaming," which must mean, I think, the playing of games or other betting contrivances, prohibited by law either generally or under particular circumstances. We must now inquire whether the game of "House," played in the manner described, is contrary to the common law or to any statute which applies to Ireland, for many of the statutes dealing with gambling in England do not apply to Ireland, having been passed in the period which elapsed between Poynings' Act and the Legislative Union. We must, therefore, be careful in relying upon English authorities to see that they do not depend upon such statutes.

The game of "House"—if it can be called a game at all—is undoubtedly a game of pure chance. All that the player does is to cross out a number on his card when that number is called by the person who draws the numbers from the urn or box. This requires no skill whatsoever. It is only a record of the drawing; and the playing of the so-called game really consists in the drawing of the numbers from the urn. In my opinion, therefore, it is not a game at all, in the ordinary signification of the term, but a lottery, and, as such, is forbidden by the Lottery Acts.

A lottery is defined in the Imperial Dictionary as "An arrangement for the distribution of prizes by chance among persons purchasing tickets." In Webster's Dictionary it is more briefly defined as "A distribution of prizes by lot or chance." This latter definition has the advantage of having been judicially recognized as accurate. Hawkins J. accepted it as correct, when delivering the judgment of the Court in *Taylor* v. *Smettin* (1). Thus a sweepstake has been held to be a lottery: *Allport* v. *Nutt* (2). The so-called game of "House" appears to me also to be nothing but a lottery, in which the drawing of the numbers is a little protracted, so as to keep up the excitement. If each of the players had on his card only one number instead of fifteen, and merely claimed his money when that number was called, no one could argue that the game was not a lottery. It seems to me to make no difference that there are fifteen numbers on the card instead of one, and that five in a row must be called before the prize is won.

If the game of "House" is a lottery, as I hold that it is, it is clearly prohibited by a whole series of Acts which are in force in Ireland. Some of these are Irish Acts passed by the Irish Parliament before the Union; others are Imperial statutes passed by the Imperial Parliament since 1801. The policy of the law, for two hundred years, both in England and Ireland, has been to suppress lotteries as much as possible, and that policy appears in numerous statutes, which, however, have not been as strictly enforced as they might have been.

The earliest Act still in force in Ireland (though there were earlier ones now repealed) is 6 Anne, c. 17. That Act enacts that all public lotteries shall be deemed to be common and public nuisances, and provides a penalty upon persons setting them up. That Act applied only to public lotteries, but it was followed by the 11 Anne, c. 6, which enacts that "all lotteries shall be deemed, adjudged and taken to be public nuisances," and provides a penalty on persons playing thereat. Private, as well as public lotteries were thus rendered illegal; and the subsequent Acts, 13 Geo. 2, c. 8 (Ir.), and 42 Geo. 3, c. 119, merely elaborated the provisions of the earlier Acts.

I should mention, however, that by 45 Geo. 3, c. 148, sect. 59, it is provided that proceedings under the Lottery Acts can only be taken at the suit of the Attorney-General. Mr. Swifte seems to have thought that this section precluded him from deciding in the present proceedings that the game of "House" was a lottery, inasmuch as the prosecutor is a police inspector only. I cannot agree with this view, for this is not a proceeding under the Lottery Acts at all, but under another statute more general in its scope, and the only reason for referring to the Lottery Acts is to show that carrying on the game of "House" is "unlawful gaming" within the meaning of the section under which the prosecution is brought (17 & 18 Vict. c. 38, sect. 4). This Act is not a Lottery Act at all, but an Act for the suppression of gaming houses, as its title indicates. I am, therefore, clearly of opinion that the game of "House" is a lottery, and that the playing of it, whether in public or private, is "unlawful gaming" within the meaning of the fourth section of the Gaming House Act, 1854.

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(1) 11 Q. B. D. 207.

(2) 1 C. B. 974.

I might, I think, base my judgment that the game of "House," as proved to have been played in the present case, is illegal, upon broader grounds than the Lottery Acts. Hawkins J., a very high authority on the law of gambling, in the leading case of *Jenks* v. *Turpin* (1) said that he was inclined to hold that any game of mere chance was an unlawful game. This principle, with a modification, was adopted in the subsequent case of *Morris* v. *Godfrey* (2), where it was held that a person who, *for profit to himself*, allows a game of chance to be carried on for money, is using the house where it is being carried on for the purpose of unlawful gaming. The facts of that case closely resemble those proved in the present prosecution, except that the game carried on was not "House," but progressive whist, a game which is not a game of pure chance such as "House" is.

Morris v. *Godfrey* (2) was followed and approved by this Court in *Donaghy* v. *Walsh* (3). "The decision involves," as Gibson J. says at p. 274, "that a game of chance is unlawful—where, at least, the owner, as in that case, has a pecuniary profit in getting persons to play." This principle, as stated by Gibson J., may be taken, in my opinion, to be well established both in England and Ireland, and, as applied to the present case, proves that the game of "House," as carried on at the Bricklayers' Hall, was "unlawful gaming" not only because it was a lottery, but because it was a game of pure chance carried on for a pecuniary profit to the owners of the hall; for I think it is clear on the evidence that the proprietors of the hall must have made a considerable profit on the playing, over and above the small sum which would be required for the lighting and heating of the hall.

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(1) 13 Q. B. D., at p. 524.
(2) 23 Cox, 40.
(3) [1914] 2 I. R. 261.

For these reasons I am of opinion that the decision of the magistrate was wrong; that he ought to have convicted the defendant; and that the case should be sent back to him with directions to proceed with it according to our decision in the matter.

MADDEN J.:—

The word "lottery" in its ordinary use in the English language would not at first sight appear to be applicable to a game like "House," for it seems to connote the awarding of a prize as the result of the drawing of lots. But on further examination I am satisfied that the word has a wider application. In the New English Dictionary the word is thus defined: "An arrangement for the distribution of prizes by chance among persons purchasing tickets." Dr. Johnson's definition of the word is wider still: "A game of chance, a sortilege, distribution of prizes by chance, a play in which lots are drawn for prizes." Although Dr. Johnson's dictionary has been supplanted by the great work now approaching completion, his position as a master of the English language is unimpaired.

The question for us is whether this game is a lottery within the statutes of the 6th and 11th of Anne; and in determining this question, I turn to the words of the statute. I am of opinion that the game, when closely examined, constitutes an example of the "mischievous and unlawful games called lotteries," which were prohibited by the Act of 11 Anne, c. 6. A lottery under this includes a game the result of which is determined "either by lots, cards, balls, or any other numbers of figures, or any way whatsoever." The nature of the game has been fully stated in the judgment of the Lord Chief Justice, and the method by which the result of the game is determined clearly comes within the words of the statute which I have quoted.

The present prosecution is not under the statute of Anne, but under the 4th section of 17 & 18 Vict. c. 38, which enacts that "any person being the owner or occupier or having the use of any house, room, or place who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein" is liable on summary conviction to a penalty not exceeding £500. It is stated that a club similar in its character to that in the Bricklayers' Hall was held by the learned Recorder not to be a common gaming house within the meaning of 8 & 9 Vict. I can quite appreciate the grounds of that decision. But the present prosecution is not under that statute, and I do not yield to the suggestion that it is open to us in a prosecution under 17 & 18 Vict. to come to the conclusion that the Bricklayers' Hall is a common gaming house, and that any game played in it is, on that ground, unlawful gaming within the first section of that statute. If this club is to be attacked as a common gaming house, the proceedings should be under the appropriate Act of Parliament, in a proceeding in which the Court would have before it all the evidence relevant to the decision of such a question.

But although the Bricklayers' Club is not a common gaming house, the house is used for the purpose of the kind of unlawful gaming prohibited by the statute of 11 Anne, that is to say the holding of a lottery. Mr. Swifte seems to have thought that he was precluded from considering this question by the decision in *Reg.* v. *Tuddenham* (1). This was a most useful decision, the result of which is that penalties under the statutes of Anne are only sued for in the High Court by the Attorney-General. It is plain from the words of the statute of 11 Anne, which I have read, that it includes lotteries of all kinds, irrespective of the purpose in which they might originate. The discretion which is exercised by the Attorney-General is a protection against the mischief which would result from the action of well-meaning but unwise enthusiasts, who might invoke the law to put an end to lotteries or raffles organized for innocent or laudable purposes, under circumstances, and with consequences, as different from those mentioned in the preambles to the statutes of Anne as light is from darkness. The discretion vested in the Attorney-General has been always so exercised. It has never been suggested that the sanction of the Attorney-General should be obtained for a prosecution under the 17 & 18 Vict.; nor is there any reason why this should be so, for the user of a house or room for the purpose of playing an unlawful game is under all circumstances an evil. A prosecution under that statute is not for holding a lottery or raffle, but for using a house for unlawful gaming, the particular game for which it is used being a lottery, a game which has been declared to be unlawful by the earlier statutes to which I have referred. The danger to the public from the user of a house, whether or not it be a common gaming house, for the purpose of playing unlawful games of chance, is illustrated by the present case, where it is shown that workingmen are exposed to the temptation of risking sums of money altogether disproportionate to their means, with the not improbable consequence of becoming victims of the vice of gambling, which causes the ruin of so many lives.

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(1) 9 Dowl. P. C. 937.

A game in which the chances are not equal between the players, including the keeper of the bank, is an unlawful game. In "House" the profit taken by the president is not regulated by chance. The chances are equal as between the players, and the amount taken by the president is a certain proportion of the money in the pool. In the present case this amount is not the property of the president, but is applied to the lighting, &c., of the hall; and the case before us differs in this respect from *Morris* v. *Godfrey* (1) and *Monro* v. *Kelly* (2). Whether it comes within the principle laid down and applied in these cases is a question upon which I do not think it necessary to express an opinion. In concurring in the judgment of the Court I rest my judgment on the reasons which I have stated.

BOYD J. concurred.

Solicitor for the appellant: *Sir Malachy Kelly.*
Solicitors for the respondent: *Gerald Byrne & Co.*

C. L.

(1) 23 Cox, 40. (2) 45 I. L. T. R. 179.

PORTER *v.* KIRTLAN (1).

K. B. Div.
1915.
Nov. 9.

(1914. No. 11,037.)

Practice—Security for Costs—New Trial Motion—Supervening Insolvency—Time for making Application—Delay in Applying.

On the 14th May, 1915, a verdict and judgment were entered for the plaintiff in an action. On the 9th June notice of motion for a new trial was served by the defendant, and but for the heavy list the case might have been disposed of in the Trinity Sittings. On the 27th October the case appeared in the list, but on the application of the plaintiff it was adjourned for his convenience. On the 30th October, the plaintiff received a circular, dated the 28th October, informing him that the defendant had made an assignment of his property for the benefit of his creditors.

Held, that an application by the plaintiff that the defendant be ordered to give security for costs ought, in the circumstances, to be refused.

This was an application by the plaintiff that the defendant be ordered to give security for the plaintiff's costs of a motion on behalf of the defendant to have the verdict given in the action against him set aside. The plaintiff was a solicitor, practising in Belfast and Dublin; and the defendant was a solicitor, practising in Eastbourne. The plaintiff was retained by the defendant to conduct proceedings in the King's Bench Division in Ireland on behalf of an English company, clients of the defendant. In connexion with those proceedings, the plaintiff subsequently brought an action against the defendant for work done and professional services rendered. That action was tried on the 14th May, 1915, before Dodd J., without a jury, and resulted in a verdict and judgment for the plaintiff.

Notice of motion to have the verdict and judgment set aside, or for a new trial, was served by the defendant on the 9th June. The case was in the list on the 27th October, but was adjourned on the application of counsel for the plaintiff.

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(1) Before Gibson and Kenny JJ.

On the 30th October the plaintiff received a circular, dated the 28th October, from Messrs. Hillman, Burt, and Warren, solicitors, Eastbourne, stating that the defendant had submitted to his creditors a statement relating to his financial affairs, and asking the plaintiff to attend a meeting to be held on the 1st November. The circular added that, "In order to preserve his assets in the meantime it has been deemed advisable for him to execute a deed of assignment for the benefit of his creditors." After the receipt of the circular the plaintiff wrote to Messrs. Hillman, Burt, and Warren, to know if they were proceeding with the new trial motion. On the 1st November they replied by wire:—"Kirtlan will abandon appeal if Hamilton & Craig consent."

An affidavit filed by Messrs. Hamilton & Craig, the Irish solicitors for the defendant, stated that the briefs for the new trial motion were delivered to the defendant's counsel on the 23rd June, and that the motion was ready and ripe for hearing last Trinity Sittings. Were it not for some heavy new trial motions which had priority, the case might have been disposed of before the circuits went out in July last. All the expense for the purpose of bringing the new trial motion to a hearing was incurred by the plaintiff and the defendant long before the issue of the circular of the 28th October. The defendant's instructions to their firm were to the effect that they were to act as they might be advised with regard to abandoning the motion for a new trial; and they were advised that the motion should not be abandoned.

"The question to be decided in this action," the affidavit continued, "has not heretofore been decided by the King's Bench Division or Court of Appeal in Ireland, and is one of great importance, not only to the solicitors' profession, but to the public generally, as it affects the relationship which exists between Irish and English solicitors in dealing with the business of clients sent either from an Irish solicitor to an English solicitor, or from an English solicitor to an Irish solicitor, and it is, therefore, much to be desired that the decision of the Divisional Court in this action should be obtained."

Best K.C. (with him *Bartley*), for the plaintiff :—

Where, pending the hearing of a new trial motion, one of the parties becomes an arranging debtor he may be ordered to give security for costs : *Magill* v. *Stewart* (1). A person who is merely a nominal defendant may also be required to give security : *Brooke* v. *Kavanagh* (2). Here the defendant has now no interest whatever in this action. It was held in *Heckscher* v. *Crosley* (3), that a party moving for a new trial, after trial with a jury, would not be ordered to give security ; but that case has been overruled by *Wightwick* v. *Pope* (4), which decides that an order may be made for security for costs on an application for a new trial.

W. G. Gibson K.C., and *Swayne*, for the defendant :—

It is submitted that insolvency arising after notice of motion for a new trial has been served, and after all the expenses connected with the preparation of the case have been incurred, is not a sufficient reason for staying the proceedings unless security for costs is given. Furthermore, if this case had been heard in the ordinary course it would have been disposed of before notice of the application for security was served. The plaintiff should not be allowed to take advantage of an adjournment granted at his instance, and solely for his convenience. Taking all these circumstances into account, the application for security is too late : *Grant* v. *Banque Franco-Egyptienne* (5) ; *Pooley's Trustee* v. *Whetham* (6) ; *Mayor of Saltash* v. *Goodman* (7) ; *In re Indian, Kingston, and Sandhurst Mining Company* (8). [They also referred to *Bradford Commercial Banking Company* v. *Cure* (9) ; *Ellis* v. *Stewart* (10).]

The action affects the business relationship between Irish and English solicitors, and where an issue of novelty and importance is involved, a party, even though insolvent, ought not to be ordered to give security for costs : *Rourke* v. *White Moss Colliery Company* (11), at page 562.

(1) I. R. 9 C. L. 474.
(2) 21 L. R. Ir. 474.
(3) [1891] 1 Q. B. 224.
(4) [1902] 2 K. B. 99.
(5) 1 C. P. D. 143.
(6) 33 Ch. D. 76.
(7) 43 L. T. (N. S.) 464.
(8) 22 Ch. D. 83.
(9) 35 Ch. D. 7.
(10) 35 Ch. D. 459.
(11) 1. C. P. D. 556.

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Bartley, in reply:—

The plaintiff moved at the moment he got notice of the assignment by the defendant in favour of his creditors, and, therefore, was guilty of no delay.

GIBSON J.:—

The application to give security for costs in this case has been made under novel circumstances. Apparently the action involved an important question of principle, namely, whether an English solicitor who employed a solicitor in this country to conduct certain litigation was personally liable to the Irish solicitor for costs. The action was tried before Mr. Justice Dodd, without a jury, and he gave judgment for the plaintiff.

A notice of motion to have the verdict and judgment set aside was served by the defendant, and if the motion had been pressed forward with diligence, the litigation might have been finally determined by the King's Bench Division in the month of June last. It was not, however, possible to dispose of the case then, because there was a pressure of business. The motion stood over until October; and on the 27th or 28th of that month it appeared in the list. It was not a long case, and it would probably have been disposed of at the end of the first day's argument. On the application of the plaintiff's counsel the hearing of the motion was postponed.

On the 28th October, 1915, the defendant's English solicitors issued a circular indicating that the defendant had executed a deed of assignment in favour of his creditors. We know nothing of the offer which he made or of the extent of his insolvency. It would, of course, be in the interest of the other creditors if the debt in this case could be extinguished. The English firm of solicitors acting for the defendant informed the plaintiff that they would abandon the appeal if Messrs. Hamilton & Craig, the Irish solicitors, consented. I read the word "consent" as meaning if Hamilton & Craig so advised. It means that the English solicitors say, "We have no connexion with this Irish appeal, and we will abide by the decision of Hamilton & Craig." If the Court thought that Hamilton & Craig were proceeding with the case for the purpose of making costs, it would be a different question, because then the appeal would not be bona fide, which is not at all suggested.

Messrs. Hamilton & Craig have made an affidavit stating distinctly that they were advised to proceed with the appeal. I assume, therefore, that there is something to argue, and that the appeal ought to be heard. In that state of facts what ought we to do? If the execution of the deed in favour of the defendant's creditors had taken place, either before the notice of motion for a new trial was launched, or soon afterwards, the plaintiff would, I agree, be entitled to carry his present motion.

No doubt there is a distinction between the English and the Irish practice which is stated in the decisions of the Irish Court of Appeal. Impecuniosity alone is not here a sufficient ground upon which to base a motion for security for costs. In England the courts very freely grant motions for security for costs, but in Ireland the courts are less inclined to allow such motions: see *Hennessy* v. *Keating* (1).

The next question in this case is: Is this application too late? I do not mean too late in the sense of the applicant lying by. It was suggested by counsel for the defendant that the plaintiff was all along aware of the financial delicacy of the defendant, and might have made his application at an earlier period. I do not think that that would be a ground for applying at all. The plaintiff had no right to apply until he got the circular on the 30th October. This case should have been, or could have been, heard on the 28th October, and all the costs of the new trial motion which was then ready for hearing had been incurred on both sides. It is by a mere accident that this motion comes before us to-day because the new trial motion was postponed at the instance of counsel for the plaintiff. We cannot shut our eyes to that fact; and the question being one of discretion, subject to well-ascertained judicial rules, it is hard for us to decide that the defendant be compelled to give security as a condition to fighting this appeal when he had been ready to have the same argued and disposed of several days before, and that the plaintiff should be placed in a better position because there had been a supervening accidental delay, the result of his

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(1) 41 Ir. L. T. R. 203.

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own application for postponement. The facts are very special. The plaintiff could hardly be allowed to get the costs of an appeal which he prevents from being heard.

We will make no rule on this motion, the defendant's costs to be costs in the cause.

KENNY J. concurred.

Solicitors for the plaintiff: *H. C. Neilson & Son.*
Solicitors for the defendant: *Hamilton & Craig.*

C. L.

K. B. Div. 1915. Oct. 28. Nov. 16.

THE KING (LOCAL GOVERNMENT BOARD) *v.* THE GUARDIANS OF THE POOR OF LETTERKENNY UNION (1).

Vaccination Acts—Neglect by Guardians to enforce—Duty of Guardians—"May direct proceedings"—Mandatory Operation of Words—Mandamus—Prosecutor—Powers of Local Government Board—Statute—Construction—"May" read "shall"—Vaccination Amendment (Ireland) Act, 1879 (42 & 43 *Vict. c.* 70), *s.* 10.

Section 10 of the Vaccination Amendment (Ireland) Act, 1879, provides that "the guardians of any union in Ireland may direct proceedings to be instituted for the purpose of enforcing obedience to the provisions of the Vaccination (Ireland) Acts."

Held, that this provision is mandatory in its character, and imposes a duty upon the guardians, which can be enforced by mandamus, to take steps to put into operation the compulsory provisions of the Vaccination Acts within their district.

Held, also, that the Vaccination Acts and the Poor Relief Acts are so closely connected that the power of control and supervision vested in the Local Government Board over guardians as regards their duties under the Poor Law Acts, extends to their duties under the Vaccination Acts, and that the Local Government Board is a proper relator in an application for a writ of mandamus commanding the guardians to enforce the provisions of the Vaccination Acts.

MANDAMUS.

This was an application by the Local Government Board to make absolute a conditional order for a writ of mandamus directed to the Guardians of the Poor of the Letterkenny Union, com-

(1) Before CHERRY L.C.J. and MADDEN and BOYD JJ.

manding them, according to their duty and authority in that behalf, to enforce compliance with the provisions of the Vaccination Acts within the union.

On the 16th October, 1914, a circular letter was sent by the Local Government Board to the clerk of each union in Ireland, including the clerk of the Letterkenny Union, asking that boards of guardians should pay special attention to the carrying out of vaccination in their unions.

On the 23rd October the circular letter of the Local Government Board came before the guardians, who took no action on it. On the 26th October the Board wrote to the guardians requesting them to enforce strict compliance with the Vaccination Acts in their union. That letter came before the guardians at their meeting on the 30th October, when no action was taken, the matter being left optional with the parents as to the vaccination of their children.

In the course of further correspondence the Board pointed out that vaccination was not optional under the statutes; that it was the duty of the guardians to enforce the law in that respect, and that in the event of their failure to take the necessary steps to enforce the Acts throughout the union, the Board would be compelled to apply to the King's Bench Division for a writ of mandamus compelling them to do so. It was ascertained from the medical officers of the union that there were 290 defaulters under the Vaccination Acts. The correspondence between the board and the guardians on the subject continued until the 17th June, 1915, and as the guardians throughout persisted in their refusal to enforce the Vaccination Acts, the Local Government, on the 15th July, obtained a conditional order for a writ of mandamus directed to the guardians, commanding them to enforce compliance with the said Acts.

In an affidavit showing cause the clerk of the union stated that the guardians, who voted to leave the question of vaccination in the Letterkenny Union optional with the parents, did so in the exercise of a bona fide discretion reposed in them by the Legislature, as they conscientiously considered, in the best judgment they could form on the information before them, that it would be unfair to compel parents to submit their children to the admitted risks of vaccination, including the use of impure lymph, whilst parents in Great Britain were exempt if they objected on conscientious ground; and in obedience to the local opinion which prevailed on the utility and danger of vaccination, and in no way in opposition to the desires of the Local Government Board. The guardians also submitted that they were the sole and ultimate and final authority to decide whether or not the Vaccination Acts should be enforced in their union, and that there did not exist the right in the prosecutors to call upon or compel them to enforce the said Acts in the Letterkenny Union.

The Attorney-General (*John Gordon K.C.*) (with him *Wylie K.C.* and *Macrory*), for the prosecutors:—

In view of the case made by the respondents, it is necessary to give a brief sketch of the powers of control and supervision over poor law guardians possessed by the Local Government Board. Under the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), s. 3, the administration of relief to the poor throughout Ireland was subject to the "direction and control" of the Poor Law Commissioners, not only in reference to that Act, but to such laws as should be in force "at the time being." Sections 26, 59, 100, and 120 show that the guardians, under the direction and control of the commissioners, had to enforce certain things. Under the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), s. 2, the guardians were empowered to recover rates. Section 17 provided for the expenses of prosecutions, and, by section 28, the Act of 1843 and the prior Poor Relief Acts were to be construed as one Act. The Poor Law Administration Act, 1847 (10 & 11 Vict. c 90), separated the administration of the laws for the relief of the poor in Ireland from the English poor law system, and appointed separate commissioners for Ireland. The Medical Charities Act, 1851 (14 & 15 Vict. c. 68), brought in two commissioners, one of whom had to be a practising physician or surgeon, and section 13 enacted that the medical officer of every dispensary district should vaccinate all persons who might come to him for the purpose. In 1872 the Local Government Board for Ireland was established by the Act 35 & 36 Vict. c. 69. This Act transferred to the new board all the powers and duties of the former commissioners.

So far as Ireland was concerned, the vaccination code in operation consisted of: Vaccination (Ireland) Act, 1858 (21 & 22 Vict. c. 64); Compulsory Vaccination Act, 1863 (26 & 27 Vict. c. 52); and the Vaccination Amendment (Ireland) Act, 1879 (42 & 43 Vict. c. 70).

Under the Act of 1858 the former dispensary committees were compelled, "subject to the approbation of the commissioners," to divide dispensary districts into so many vaccination districts as they might deem advisable, and the medical officer of each district was required to attend at some convenient place within each vaccination district, and to vaccinate all persons resident in his district who might come to him for that purpose, or whom he might be required to vaccinate: sect. 1. Vaccination was first made compulsory in Ireland by the Act of 1863. By section 8 a penalty was imposed on any parent or guardian who failed to comply with the Act. Section 7 of the Vaccination Amendment (Ireland) Act, 1879, provided that every parent or person having the custody of a child who neglected to have such child vaccinated, and did not render a reasonable excuse for his neglect, should be guilty of an offence, and liable to a penalty not exceeding twenty shillings. Section 10 of the Statute of 1879 enacted that "The guardians of any union in Ireland may direct proceedings to be instituted for the purpose of enforcing obedience to the provisions of the Vaccination (Ireland) Acts." It made the expenses incurred in prosecutions payable out of the poor rates of the union. The reason the word "may" was inserted in section 10 was because the Legislature contemplated that, as provided in section 7 of the same Act, there might be cases where a reasonable excuse for neglect could be given. In statutes authorizing persons to do acts for the public good or the advancement of justice, the Legislature intends that the power conferred shall be exercised, and, accordingly, the word "may" is the same as the word "shall": *Julius* v. *Lord Bishop of Oxford* (1); *In re Eyre and Leicester Corporation* (2); *Russell* v. *Russell* (3); *R.* v. *Adamson* (4); *Rex* v.

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(1) 5 App. Cas. 214.

(2) [1892] 1 Q. B. 136.

(3) L. R. Pr. (1895), 315.

(4) 1 Q. B. D. 201.

Barlow (1); *Bowers* v. *Hope* (2); *In re Galwey's Estate* (3); *In re Warden's Estate* (4); *the King* (*Byrne*) v. *Justices of Dublin* (5).

Henry K.C. and *A. E. Wood* for the respondents:—

We submit that the guardians are under no legal obligation to direct prosecutions against defaulters under the Vaccination Acts, and that even if such a duty is cast upon them, the Local Government Board have no legal specific right to a mandamus against the guardians, commanding them to enforce the provisions of these Acts.

By the English Vaccination Act of 1867 (30 & 31 Vict. c. 84), sect. 27, it is enacted that if the guardians find that the provisions of the Act have been neglected, they "shall cause proceedings to be taken" against the persons in default. Section 28 provided that the guardians "may pay" out of their funds all reasonable expenses, and "may pay" any officer appointed by them to prosecute persons charged with offences against them, or otherwise to enforce its provisions. The Act of 1871 (34 & 35 Vict. c. 98), sect. 5, referring to section 28 of the Act of 1867, provided: "Whereas it is expedient to render obligatory the appointment of such officer: Be it enacted that the guardians of every union and parish shall appoint and pay one or more of such officers." In that enactment Parliament recognized that "may" was optional until it was made mandatory by subsequent legislation. Further, section 5 of the Vaccination Act, 1871, conferred upon the English Poor Law Board the same powers with respect to guardians and vaccination officers in matters relating to vaccination as they had with respect to guardians, and officers of guardians, in matters relating to the relief of the poor. The Irish legislation contains no corresponding provision. The English Vaccination Act, 1874 (37 & 38 Vict. c. 75), empowered the Local Government Board to make rules, orders, and regulations prescribing the duties of guardians and their officers in relation to the institution and conduct of legal proceedings. In Ireland vaccination is not part of the poor law system; and the Local Government Board has no power over the guardians except such as has been expressly given to it.

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(1) 2 Salk. 609.

(2) 11 H. L. C. 389.

(3) [1906] 1 I. R. 137.

(4) [1906] 1 I. R. 434.

(5) [1904] 2 I. R. 190.

A metropolitan district board of works, which, as the sanitary authority, was charged with the duty of putting in force powers relating to public health and local government, was held to have no legal specific right to enforce the performance by the guardians of their duties under the Vaccination Acts: *The Queen* v. *Lewisham Union* (1). The Lewisham District Board of Works was in the same position as the Local Government Board in this case. In England the vaccination officer may prosecute: *Moore* v. *Keyte* (2); and under section 147 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), the medical officer is empowered to prosecute.

Mandamus will not, apparently, be granted to compel an individual or a public body to take criminal proceedings or to bring an action: *The Queen* v. *The Commissioners of the Port of Southampton* (3); *Reg.* v. *The Commissioners of the Port of Southampton* (4).

Wylie K.C., in reply:—

Section 3 of the Vaccination Amendment (Ireland) Act, 1868 (31 & 32 Vict. c. 87), which states that vaccination "shall not be considered to be parochial relief," shows that the Legislature recognized vaccination as part of poor law relief. The Vaccination Acts clearly intended that the machinery of the poor law system should be employed for the purpose of putting the Acts in force.

Cur adv. vult.

Nov. 16.

Cherry L. C. J.:—

This is an application on the part of the Local Government Board to make absolute a conditional order for a writ of mandamus directed to the guardians of the poor of the Letterkenny Union, commanding them forthwith to enforce compliance with the Vaccination Acts within their district.

The subject of compulsory vaccination has been for some time a burning one in Letterkenny. It first came formally before the guardians at their meeting on the 23rd of June, 1913, when a resolution was adopted that the matter of vaccination be left an open one, and that no prosecution be instituted in case of non-vaccination. The affidavit of their clerk explains the grounds upon which the guardians adopted this course to which (except for a short period during the present year) they have since adhered—and he says that the guardians were informed that they were the final and ultimate tribunal to decide as to the enforcement of the provisions of the Vaccination Acts within their Union. Whether they are so or not, it is for us now to decide.

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(1) [1897] 1 Q. B. 498.

(2) [1902] 1 K. B. 768.

(3) 1 B. & S. 5.

(4) L. R. 4 H. L. 449.

Vaccination was first made compulsory in Ireland by the 26 & 27 Vict. c. 52; and it is important to note that the 13th section of that Act provided for the enforcement of its provisions by the guardians of the poor. That section is now repealed, together with other provisions of the Act, and the matter is now regulated by the Vaccination Amendment (Ireland) Act, 1879 (42 & 43 Vict. c. 70), section 7 of which Act provides for a penalty being recovered from parents and other persons having the custody of children who neglect to have them vaccinated according to the provisions of the Vaccination (Ireland) Acts. Section 10 provides that "the guardians of any union in Ireland may direct proceedings to be instituted for the purpose of enforcing obedience to the provisions of the Vaccination (Ireland) Acts." It also directs that the medical officers of each dispensary district shall attend such proceedings, and shall be entitled to remuneration on a fixed scale for doing so. These provisions are put in force by nearly all boards of guardians in Ireland; but the defendants in the present proceedings point-blank refuse to discharge this duty.

The first question which we have to determine is whether section 10 of the Vaccination Act, 1879, is or is not mandatory in its operation. It provides, it is true, only that the guardians *may* direct proceedings to be instituted; and the guardians contend that this language gives them a discretion in the matter. But it is settled law that provisions in a statute merely of a permissive character may impose a duty. Thus, in a case as old as the reign of William and Mary, it was laid down that where a statute directs anything to be done which is for the public good, words of permission may be construed as mandatory in their operation:

Rex and Reg. v. *Barlow* (1). This canon of construction is well established ever since the decision of *Julius* v. *Bishop of Oxford* (2) in the House of Lords, and cannot now be questioned.

In reference to the present case, it is to my mind clear that when the Legislature provided that the guardians might take certain proceedings, and when at the same time it provided for the expense of the proceedings being paid out of the rates, it meant to cast the duty upon the guardians of enforcing the provisions of the Acts in all proper cases. There is no one else to act in the matter, and if the guardians do not do so, the Acts will become a dead letter. For these reasons I am clearly of opinion that the 10th section of the Vaccination Act, 1879, is mandatory in its character, and that it is the clear duty of the guardians—a duty which can be enforced by mandamus—to take steps to enforce the compulsory provisions of the Vaccination Acts within their district.

Another objection to the granting of the order for a mandamus in the present case was raised by Mr. Henry. He argued that the Local Government Board had no authority to enforce compliance with the Vaccination Acts upon the guardians, and therefore that they could not act as relators in the present proceedings.

By the Local Government Act, 1872 (35 & 36 Vict. c. 69), all the powers of the Poor Law Commissioners were transferred to the Local Government Board, which was created by that Act. These powers consisted of a general direction and control of the guardians in the discharge of their duties connected with the relief of the destitute poor under the original Poor Law Act, 1838 (1 & 2 Vict. c. 56). It is argued that the Vaccination Acts are not part of the Poor Law Acts, and that their administration is a matter with which the Local Government Board has nothing to do. But, although the Vaccination Acts may be considered to deal with a matter quite distinct from the relief of the destitute poor, which is the primary object of the Poor Law Acts, in the administration of the former Acts the machinery provided by the Poor Law Acts has always been made use of. In addition to this,

(1) 2 Salk. 609.

(2) 5 A. C. 214.

in the vast majority of cases vaccination is performed by the medical officer of health appointed by the guardians, and the expenses are paid for out of the poor rate. The two series of Acts are, therefore, so closely connected, that the power of control and supervision vested in the Local Government Board over the guardians as regards their duties under the Poor Law Acts may very reasonably be held to extend to their duties under the Vaccination Acts.

For these reasons I am of opinion that the Local Government Board has a *locus standi* to interfere where the guardians are not carrying out their duties under the Vaccination Acts, and that it is a proper relator in this proceeding. The conditional order for a writ of mandamus should, therefore, in my opinion, be made absolute.

With regard to the question of costs, as this is the first occasion upon which it has been decided in Ireland that the duty of enforcing the Vaccination Acts is mandatory upon Boards of Guardians, and as the Letterkenny Guardians appear to have adopted the course they did in the bona fide belief that they legally had a discretion in the matter, I do not think that they ought to be required to pay the costs personally. But I should like it to be understood that, for the future, if our order in this case stands, guardians who persistently refuse to enforce the Vaccination Acts within their districts will do so at the peril of being obliged personally to pay the costs of proceedings to compel them to discharge their duty in this respect.

MADDEN J:—I am of the same opinion, and for the same reasons, and I have nothing to add to the judgment.

BOYD J:—I also concur, and I have nothing to add.

Solicitors for the prosecutors: *T. T. Mecredy & Son.*
Solicitors for the respondents: *E. M'Fadden & Co.*

C. L.

HEGAN *v.* CAROLAN (1).

K. B. Div.
1915.
Dec. 10, 11, 15.

Trespass to Land—Conflicting Claims—Acts amounting to an Intention to assume Possession.

B. was the owner of a field let in conacre to the defendant on a letting expiring in November, 1914. B. sold the field to the plaintiff in April, 1915. The defendant continued to keep his cattle on it. In July, 1915, the plaintiff entered the field and cut down some trees. Two days afterwards he broke the lock on the gate of the field and entered and put his own cattle there. They were almost immediately afterwards driven off by the defendant. The plaintiff having subsequently brought an action against the defendant for trespass to the lands:

Held, that the acts of the plaintiff showed that he intended to assume possession and did the acts in assertion of his right to possession, and that the plaintiff had thereby obtained a possession sufficient to entitle him to maintain trespass.

Trial of action before Pim J., without a jury.

The facts, in so far as they are material to the present report, were as follows:—

Howard Brown, the plaintiff's predecessor in title, had let a field known as the field of Anny to the defendant in conacre for the season ending the 1st November, 1914. The defendant alleged that during the currency of this letting, viz., on the 30th October, 1914, Brown agreed to sell him the field. There was no corroboration of this evidence; but, relying on it, as he said, the defendant remained on in possession of the field. On the 6th of April, 1915, Brown conveyed to the plaintiff his entire interest in (*inter alia*) the field of Anny, and the plaintiff in his evidence stated that formal possession was given to him; but the defendant in pursuance of an alleged right continued in actual possession, and kept his cattle on the field for about a fortnight, in spite of the plaintiff's protests, and according to his own evidence continued to graze them on the field from time to time. On the 22nd July two of the plaintiff's workmen, on his instructions, entered the field of Anny and cut down a tree; and on the 24th July, the

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(1) Before Pim J.

K. B. Div.
1915.

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plaintiff broke a lock which the defendant had put on the gate of the field, and put his cattle thereon, which cattle the defendant almost immediately drove away. The defendant remained in occupation of the lands from that time till the date of issue of the writ.

The plaintiff brought the present action claiming damages in trespass.

Horner, *K.C.*, and *Monroe*, for the plaintiffs, cited *Booth* v. *M'Manus* (1); *Lows* v. *Telford* (2); *Butcher* v. *Butcher* (3).

The Solicitor-General (*James O'Connor K.C.*) and *Cusack*, for the defendant:—

Actual possession is necessary to found an action of trespass: Encyclopædia of the Laws of England (2nd ed.), vol. 14, p. 247, *sub tit.*, 'Trespass, quare clausum fregit'; *Wallis* v. *Hands* (4), *Ryan* v. *Clark* (5); and see also Bullen and Leake, ed. 1915, p. 421, note, and the cases there collected.

Cur. adv. vult.

Dec. 15.

PIM J.:—

I have to try two actions which have been consolidated. In the first, the plaintiff sought to recover from the defendant possession of certain mills at Clonfad; in the second he claimed damages for trespass to a certain field known as "the field of Anny." It is quite clear on the evidence—indeed it is admitted by the defendant—that he has no defence to the claim in the first action, and I accordingly give judgment for possession of the mills. There remains the action of trespass, which involves a point of law which has been strenuously argued. I felt some surprise that the plaintiff chose a different form of action in the second case from that which he adopted in the first case; but in doing so he was within his rights, and is entitled to a decision. The defendant seems to think that he has been badly treated and has a grievance. It may be so, and he may have or may not have

(1) 12 I. C. L. R. 418.
(2) 1 A. C. 414.
(3) 7 B. & C. 399.
(4) [1893] 2 Ch. 75.
(5) 14 Q. B. 65.

claims against other parties; but against the plaintiff, who was a purchaser in open market and for full consideration, he has no grievance at all, and he would have been wise to have come to terms with him. The sale of the lands to the plaintiff was completed on the 6th April, 1915. Both Mr. M'William and the plaintiff say that formal possession of the lands was then, or shortly afterwards, given to the latter. What exactly took place is not clear, and in any case it is not very material. The plaintiff apparently thought that he had got possession; the defendant, on the other hand, thought that he had not, and he (the defendant) left his own cattle on the field of Anny. The plaintiff further says that he from time to time walked across this field, thus asserting possession, but the evidence is not very convincing. What (if anything) took place between April and July is not very clear; but no evidence sufficient to establish a deliberate attempt to assume possession was given. On the 22nd July, however, the plaintiff did an act which cannot be passed over as of no importance. On that day he and his servant, or servants, entered on the field of Anny, and cut down some trees. This fact is admitted by the son of the defendant himself. That was an act which was consistent only with a determination to assert a claim to possession. Again, on the 24th July the plaintiff broke the lock on the gate of the field, and entered and put his own cattle there. The cattle were almost immediately afterwards driven off by the defendant; but for a short period of time they were there. Since then the plaintiff has done nothing which could be construed into an assumption of possession, and the defendant has remained on in occupation. What I have to decide is, were the acts of the 22nd and 24th July sufficient to give the plaintiff such possession as the law requires in order to enable him to maintain an action for trespass? The law, as propounded by the Solicitor-General and Mr. Cusack, is incontrovertible, viz., there must be actual possession before an action of trespass can be brought. Now, how can actual possession be acquired? It cannot be necessary for one who is asserting his rights to walk over every inch of a field. That would be absurd. All that is necessary is that he should do some act from which it may reasonably be inferred that he claimed the whole, and intended to assert his right to the whole. I need only refer to three authorities—*Butcher* v. *Butcher* (1), *Jones* v. *Chapman* (2), and *Lows* v. *Telford* (3). In *Butcher* v. *Butcher* (1), Lord Tenterden C.J. says (at p. 402): "If he who has the right to land enters and takes possession, he may maintain trespass. It is not necessary that the party who makes the entry should declare that he enters to take possession; it is sufficient if he does any act to show his intention. Here his servants ploughed the land. It is manifest, therefore, that he intended to take possession." In the case I am trying the plaintiff on one occasion entered and cut down some trees, and on another broke the lock of the gate, entered into the field, and put his cattle thereon. Is it not manifest from these acts that he intended to take possession, and entered and did the acts in assertion of his right? In *Jones* v. *Chapman* (4), Maule J. lays down the law with great clearness. "I agree," he says, at p. 820, "with the exception of the plaintiff in error, that the question raised by the issue of 'Not Possessed' is, whether the plaintiff was in *actual possession* or not; but it seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser." If that is so, how can the presence of cattle belonging to the person disputing the right (assuming they were there) affect the matter, if the presence of the person himself who asserts the right does not? The law as laid down by Maule J. was quoted with approval by Lord Selborne in the case of *Lows* v. *Telford* (5), at p. 426, and he adds: "And in *Harvey* v. *Brydges* (6), it is pointed out that so far as relates to the fact of possession and its legal consequences, it makes no difference whether it has been taken by the legal owner forcibly or not." I am constrained, by the evidence, to hold that the plaintiff intended to assume possession on the 22nd and 24th of July, and that he did the acts proved in the assertion of his rights; and, by the cases, to hold that the plaintiff thereby obtained actual possession of the field, and that consequently trespass will lie; and I give judgment for him with £2 damages.

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(1) 7 B. & C. 399.
(2) 2 Ex. 803.
(3) 1 A. C. 414.
(4) 2 Ex. 803.
(5) 1 A. C. 414.
(6) 14 M. & W. 442.

Solicitor for the plaintiff: *James Rountree.*
Solicitor for the defendant: *Charles Laverty.*

T. C. T.

RUTHERFORD *v.* MULLIGAN (1).

Appeal. 1915. Rutherford *v.* Mulligan.

Practice—Civil-bill decree for over £20—Removal into High Court—Certiorari—Civil-bill Procedure Amendment Act, 1864 (27 *&* 28 *Vict. c.* 99), *s.* 9.

Where a year has elapsed from the date of a civil-bill decree, and it has not been renewed, it cannot be removed by certiorari into the High Court under s. 9 of the Civil-bill Procedure Amendment Act, 1864 (2).

Appeal from an order of the King's Bench Division refusing an application on behalf of the appellant for a writ of certiorari to remove a judgment of the Civil-bill Court into the High Court.

On the 3rd June, 1914, the appellant had obtained a civil-bill decree against P. J. Mulligan for the sum of £27 16*s.* 3*d.*, and costs. On the 8th October, 1915, he applied *ex parte* to the King's

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(1) Before O'Connor M.R. and Ronan and Molony L.JJ.

(2) 27 & 28 Vict. c. 99, s. 9: "If a judge of a Superior Court shall be satisfied that a party against whom judgment for an amount exceeding £20, exclusive of costs, has been obtained in a Civil-bill Court has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the Civil-bill Court into one of the Superior Courts, and when removed it shall have the same force and effect and the same proceedings may be had thereon as in the case of a judgment of such Superior Court, but no action shall be brought upon such judgment.

Appeal. 1915. RUTHERFORD *v.* MULLIGAN.

Bench Division for a writ of certiorari to remove the decree into the High Court under the provisions of 27 & 28 Vict, c. 99, sect. 9. The application was refused on the ground that more than a year had elapsed from the date of the decree, and that it had not been renewed.

Monroe, for the appellant :—

The remedy given by sect. 9 of 27 & 28 Vict. c. 99 of obtaining a writ of certiorari to remove the judgment of the Civil-bill Court into the Superior Court is substituted for the former procedure, abolished by sect. 39 of that Act, of bringing an action on the decree. Such action could have been brought although the decree had not been renewed : *Moffatt* v. *Burrowes* (1) ; *O'Prey* v. *M'Kibben* (2). In the latter case Palles C.B. held that a civil-bill process could be brought on a decree although it had not been renewed. This shows that the decree is still alive, although execution could not be issued on foot of it. A civil-bill decree consists of two distinct parts, a judgment and an award of execution. Sect. 9 of 27 & 28 Vict. c. 99, purposely uses the word "judgment," not "decree," of the Civil-bill Court.

O'CONNOR M.R. :—

I am of opinion that in order to bring a case within sect. 9 of 27 & 28 Vict. c. 99, there must be a live judgment of the Civil-bill Court. I think that this is apparent from the words in the section requiring the judge to be satisfied that the debtor "has no goods or chattels which can be conveniently taken to satisfy such judgment." This implies that there is an operative judgment under which goods could be seized. The appeal must be dismissed.

RONAN and MOLONY L.JJ. concurred.

Solicitor for the appellant : *Herbert M'William.*

J. G. T.

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(1) 4 I. C. L. R. 297.

(2) 34 I. L. T. R. 162.

COOPER *v.* HEALY (1).

Appeal.
1915.
Feb. 25.
June 3.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Injury on Public Street by falling Masonry—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A grocer's messenger in the course of his employment was walking on the pavement of a thoroughfare in Dublin, when the parapet of a house which he was about to pass collapsed, and the workman was killed by the falling masonry. Dependants of deceased claimed compensation from the employer.

Held, that the death was not caused by accident arising out of the employment.

In such a case the test to be applied is that laid down in *Collins* v. *Collins*, [1907] 2 I. R. 104, namely, whether the accident was one "the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it."

Appeal from an order of the Recorder of Dublin dismissing a claim for compensation made by dependants of a deceased workman, under the Workmen's Compensation Act, 1906.

The deceased workman, John Cooper, was employed by the respondent as a grocer's porter and messenger, portion of his duties being to deliver groceries, which he carried in a basket strapped to his shoulders, and to bring back to his employer's shop "empties." Whilst so engaged on the 17th September, 1914, between 12 and 12.30 o'clock in the day, Cooper was walking along the pavement of Middle Abbey Street, a main thoroughfare in the city of Dublin, when the parapet of a house which he was about to pass collapsed, and Cooper was killed by the falling stones and mortar. There was no evidence as to the cause of the parapet's fall.

The Recorder reported that in dismissing the claim of the applicants he considered he was bound by the decision in *Kelly* v. *The Kerry County Council* (2).

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(1) Before O'Brien L.C., Palles C.B., Ronan L.J.

(2) 42 I. L. T. R. 23.

Louis Kelly, for the appellants :—

It is admitted that the workman's death was caused by an accident, and that the accident arose in the course of the employment. I contend that it also arose out of the employment, and that the Recorder should have so held. The workman was necessarily on the street in the course of his duty, the nature of the employment requiring him to be constantly passing to and fro. He was consequently, in the nature of things, more specially exposed to the risk of such an accident as did actually occur than an ordinary member of the public. He was exposed to it either for a greater length of time or on a greater number of occasions. The case therefore, falls within the principle of *Andrew* v. *Failsworth Industrial Society* (1) rather than that of *Kelly* v. *Kerry County Council* (2). Whether such a risk might have been reasonably contemplated by the workman when entering upon the employment is an immaterial consideration. In *Trim Joint District School Board of Management* v. *Kelly* (3) Lord Loreburn said :— " The event has proved that it arose out of his employment. I can see no reason for saying that there is to be compensation only when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer, or by a county court judge. All this has, in my view, no conclusive bearing on the simple question, Did it in fact arise out of the employment ? "

Timothy Sullivan, for the respondent :—

The accident did not arise out of the employment. It was in no sense incidental to it, and could not reasonably have been contemplated by the workman when entering the employment: *Collins* v. *Collins* (4). That is the test still to be applied, notwithstanding the dictum, which cannot be supported, of Lord Loreburn in *Trim Joint District School Board of Management* v. *Kelly* (5). The appellants have wholly failed to prove that the accident arose because of something the workman was doing in the course of his

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(1) [1904] 2 K. B. 32.
(2) 42 I. L. T. R. 23.
(3) [1914] A. C. 667, at p 682.
(4) [1907] 2 I. R. 104.
(5) [1914] A. C. 667.

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employment, or because he was exposed by the nature of his employment to some peculiar danger: see *Craske* v. *Wigan* (1); *Plumb* v. *Cobden Flour Mills Co., Ltd.* (2). *Kelly* v. *Kerry County Council* (3) shows that if the workman had been killed by lightning when passing down the street his dependants could not have recovered compensation. Therefore, if a stroke of lightning had struck the parapet, and he had been killed by the fall of the masonry resulting, his dependants could not have recovered. How is their case stronger when the cause of the fall of the parapet is unknown? Whatever risk the workman ran was one common to all his fellow-citizens. If he had been killed by a wild beast escaped from a menagerie, could the claim succeed? *Rowland* v. *Wright* (4) shows not. There the duties of the teamster, who was bitten by the stable cat, brought him into the stable where the cat was; and Cozens Hardy M. R. says: "Part of what may be called the necessary furniture of a stable is a stable cat. If the cat had been a strange cat, the case would have presented a totally different aspect; and I hope that nothing I have said will lend itself to the conclusion that if the man had been walking along the street and a cat had bitten him his master would have been liable."

[The following cases were also cited and discussed:—*Nelson* v. *Corporation of Belfast* (5); *M'Neice* v. *Singer Sewing Machine Co., Ltd.* (6); *Pierce* v. *Provident Clothing and Supply Co., Ltd.* (7); *Refuge Assurance Co., Ltd.* v. *Millar* (8); *Greene* v. *Shaw* (9); *Anderson & Co., Ltd.* v. *Adamson* (10); *Kinghorn* v. *Guthrie* (11); *Risdale* v. *Owners of SS. Kilmarnock* (12); *Martin* v. *J. Lovibond & Sons, Ltd.* (13); *Warner* v. *Couchman* (14); *Alderidge* v. *Merry* (15); *Mitchinson* v. *Day Bros.* (16); *Anderson* v. *Balfour* (17); *Nisbet* v. *Rayne* (18); *Jibb* v. *Chadwick* (19); *Murphy* v. *Berwick* (20).]

(1) [1909] 2 K. B. 635.
(2) [1914] A. C. 62.
(3) 42 I. L. T. R. 23.
(4) [1909] 1 K. B. 963.
(5) 42 I. L. T. 223.
(6) [1911] S. C. 12.
(7) [1911] 1 K. B. 997.
(8) 5 Butt. 522.
(9) [1912] 2 I. R. 430.
(10) 6 Butt. 874.
(11) 6 Butt. 887.
(12) [1915] 1 K. B. 503.
(13) [1914] 2 K. B. 227.
(14) [1912] A. C. 35.
(15) 47 I. L. T. R. 5.
(16) [1913] 1 K. B. 603.
(17) [1910] 2 I. R. 497.
(18) [1910] 2 K. B. 689.
(19) [1915] 2 K. B. 94.
(20) 43 I. L. T. R. 126.

O'BRIEN L.C.:—

An important question of principle is involved in the present appeal.

A claim was brought by Sarah Cooper, widow, and Margaret Cooper and Anne Cooper, infants under the age of twenty-one years, against James Healy, the claim being under the Workmen's Compensation Act, and arising out of the death of Sarah Cooper's husband while in the employment of James Healy.

The case was heard by the Recorder of Dublin, and it was proved that the deceased workman was employed by James Healy as grocer's porter and messenger, and was paid wages at the rate of 14*s.* a week. His duty was to deliver groceries, which he carried in a basket which was strapped to his shoulders, and it was also his duty to bring to his employer's shop from customers what were described as "empties." His duty took him along the streets of Dublin, and he was bound to deliver goods wherever he was directed to do so, and in doing so he would have to traverse the public streets.

Between ten and eleven o'clock on the morning of the 17th September, 1914, he was directed by his employer to call at a place called Gaynor's, which is in Middle Abbey Street, and between 12 and 12.30 o'clock he was passing close to a house which is known as Abbey Chambers. The parapet of the house Abbey Chambers suddenly collapsed, the stones and mortar fell on Cooper, and he received injuries which caused his death.

No question was raised as to this being anything other than an accident, and it was admitted that it was an accident arising in the course of Cooper's employment, the contest between the appellants and the respondent being whether the accident arose out of his employment.

The learned Recorder, having heard the case, stated that he was of opinion that the principle laid down in the case of *Kelly* v. *The Kerry County Council* (1) applied, and he dismissed the claim. In a note which was taken of his judgment he further stated that, applying the case of *Kelly* v. *The Kerry County Council* (1), he considered there was no evidence before him to show that the man in this employment "was in danger of portion of the premises falling on him." The question argued by the appellants was that the Recorder was wrong in principle, and that there was evidence from which, on authority, he might have drawn a different inference, and that accordingly the case should be remitted to him for consideration. It was contended that inasmuch as Cooper's employment of necessity took him into the public streets, he was thereby exposed to a risk which was accentuated by this necessary incident of the employment, and that accordingly his dependants were entitled to compensation.

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(1) 42 I. L. T. R. 23.

When the Workmen's Compensation Act of 1897 was passed, I doubt if anyone, lawyer or layman, ever anticipated the immense variety and difficulty of the questions which have arisen for solution in applying that statute; but it is in the very nature of things that this should be the case. The incidents of employment are so various, the causes which may give rise to accident and injury are so limitless, it was inevitable that as time went on great conflicts of opinion should arise, and that inconsistencies (often more apparent than real) should appear in the multitude of cases which called for the application of the remedial provisions of the statute. So long as uniformity of treatment of all has to be aimed at, and mere "haphazard" not permitted to prevail, enormous difficulty must be experienced in determining cases under the Act.

From time to time our judges have endeavoured to evolve principles which may help to guide Courts through the mazes of doubt which hinder us from reaching a uniform and satisfactory conclusion.

Owing to the infirmity of human language, formulae which at one time appeared to be universal in their application are found defective and wanting. They do not bear the test of time, and have to be dissipated by the judgment of an ultimate court of appeal; but I conceive there are still some principles which bind me, and which I am not at liberty to disregard. I have formed the conclusion that in this case there are such principles, and that their just and proper application must lead me to an affirmance of the view of the learned Recorder. These principles I find embodied in certain judgments of the Court of Appeal in England and in our own Court, and I do not find that the House of Lords has in any case, or at any time, declared them to be erroneous.

I wish to refer first in order of time to *Challis* v. *London and South-Western Railway* (1). In that case we get, as it seems to me, some way on the road to interpretation. Collins M. R. says (p. 157), "It seems to me that the Legislature, in framing the Workmen's Compensation Act, 1897, intended to provide for the risks of accident which are within the ordinary scope of the particular employment in which the workman is engaged. No doubt the Act does not use the expression 'risks incidental to the employment,' but the interpretation of the words 'accident arising out of and in the course of the employment' appears to me necessarily to involve the consideration of the question what risks are commonly incidental to the particular employment in question?" And he quotes with approval the words of the Lord Justice-Clerk in *Falconer* v. *London and Glasgow Engineering and Ship-Building Co.* (2): "It was as against accidents incidental to the special employment that the benefit of this statute was given."

The Court held in *Challis' Case* (1) that the mischievous acts of boys in throwing stones at a train passing under a bridge was a risk reasonably incidental to the employment. *Challis' Case* (1) was considered by our Court of Appeal in *Collins* v. *Collins* (3), and in this case Lord Justice FitzGibbon, in a short judgment, gives us a further test for determining the question whether in some classes of cases a risk might be considered as reasonably incidental to the employment; he says, at p. 108, "I cannot understand how an occurrence could arise out of and in the course of a particular employment, unless it was something the risk of which *might have been contemplated by a reasonable person when entering the employment as incidental to it.*" At p. 107 the Lord Chancellor, speaking of *Challis' Case*, says that the judges were unanimous in deciding that it came within the Act. "But why? Because they thought that the risk incurred by an engine-driver in passing under a bridge, from which a boy might drop a stone, was one reasonably to be contemplated by him in undertaking

(1) [1905] 2 K. B. 154.
(2) 3 F. 564.
(3) [1907] 2 I. R. 104.

the employment, and therefore it was within the scope of the employment to be subject to such a risk."

In a subsequent case of *Murphy* v. *Berwick* (1), decided in 1909, Lord Chancellor Walker, in discussing a case where a drunken man rushed from the bar of a hotel to the kitchen, and by reason of his violence caused injury to the cook, says: "No case has been cited in which an employer has been held liable for the tortious act of a third party, where such tortious act was not a risk reasonably to be contemplated by the employee in undertaking the employment. The case comes within the principle enunciated by this Court in *Collins* v. *Collins* (2)."

Unless there has been some decision of the House of Lords making it wrong for me to apply this principle, so clearly laid down by the Court of Appeal in this country, I conceive that I am bound to follow it, and in any case where I consider it ought to be applied, to apply it.

When the *Trim School Case* (3) came before the Court of Appeal, I conceived that both *Anderson* v. *Balfour* (4) and *Nisbet* v. *Rayne* (5) involved an application of the same test, and I expressed my opinion to that effect, nor do I think that I was wrong in doing so.

Lord Justice Holmes, in *Anderson* v. *Balfour* (4), at p. 502, adverted to the fact that it was a matter of common knowledge that hostility existed between poachers and game-keepers, and he adds: "One of the risks attaching to the appellant's occupation is that the hostile feeling sometimes shows itself in acts of serious violence"; and I take it that the learned Lord Justice, who was one of those who also gave judgment in *Collins* v. *Collins* (2), which was referred to in the argument, considered that this common knowledge might reasonably be used to impute to the minds of employer and employed that the gamekeeper at the time he entered into the employment might be exposed to this risk.

In *Nisbet* v. *Rayne* (5) the two Irish cases of *Anderson* v. *Balfour* (4) and *Collins* v. *Collins* (2) are dealt with by Farwell L.J. at p. 694, the learned Lord Justice pointing out that in the one case the risk was held to be incidental, and in the other not incidental. The reasoning of the Court, clearly expressed in *Collins* v. *Collins* (1), could not, as it seemed to me, have been forgotten by the learned Lord Justice; and there is nothing in his judgment expressing any disapproval of the view of Lord Justice FitzGibbon.

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(1) 43 I. L. T. R. 126.
(2) [1907] 2 I. R. 104.
(3) [1914] A. C. 667.
(4) [1910] 2 I. R. 497.
(5) [1910] 2 K. B. 689.

Now, coming to the case of *Mitchinson* v. *Day Bros.* (2), Lord Justice Buckley says (p. 608) that "the injury must be one resulting in some reasonable sense from a risk incidental to the employment, as has been decided over and over again." He refers to *Challis' Case* (3), to the judgments in *Craske* v. *Wigan* (4), and other authorities, and it is a most remarkable fact that evidence was actually taken to ascertain whether or not the carter who was injured in that case by the misconduct of a drunken man in the street was not exposed to that particular class of risk. If it could have been established that it was a constant and likely class of risk to which carters were exposed, then it might have been held to have been incidental to the employment, but as a matter of fact no such inference could be drawn, and *Mitchinson* v. *Day Bros.* (2) seems to me then to be a case in which may be applied the rule (be it right or wrong) which is clearly to be found in the decisions of the Irish Court of Appeal in *Collins* v. *Collins* (1) and *Murphy* v. *Berwick* (5).

Coming to my own decision in a recent case—*Cunningham* v. *Mahedy* (6)—while holding that the workman was entitled to compensation, following previous authorities which I thought to be binding, I again referred to this test of the risk being one reasonably within the contemplation of the parties as an absolutely legitimate one for me to apply. Now, unless the House of Lords has clearly and definitely decided that no such view is legitimate, I consider that I may, indeed that I must, continue to apply it.

In the judgment of Lord Loreburn in the *Trim Case* (7) there is a passage which is relied on, and not unreasonably, as suggesting that this view, which has certainly expressly been taken by the Court of Appeal in this country, is not reasonable or tenable. He says: "In inquiring whether or not an injury by accident in fact arises out of the employment, it surely is unnecessary to ask whether such a thing has ever happened before, or is likely to happen again, within say a hundred years, or for that matter for ever. It may happen, and has happened, and it has happened because the poor man was a schoolmaster. The event has proved that it arose out of his employment. I can see no reason for saying that there is to be compensation only when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer, or by a county court judge. All this has, in my view, no conclusive bearing on the simple question, Did it in fact arise out of the employment?"

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(1) [1907] 2 Ir. R. 104.
(2) [1913] 1 K. B. 603.
(3) [1905] 2 K. B. 154.
(4) [1909] 2 K.B. 635.
(5) 43 I. L. T. R. 126.
(6) Unreported. C. A., 23 Feb. 1915.
(7) [1914] A. C. 667, at p. 682.

There are two ways in which I conceive I may regard this passage in Lord Loreburn's judgment. Assuming, for the moment, that I am to attribute to him a distinct and clear view that it is not a proper test to apply, whether the risk was one which might reasonably have been in the contemplation of the parties, the employer or workman, I think it is quite clear that he alone of all the judges was at all affected by such a consideration. Of the non-dissenting Lords, the Lord Chancellor does not refer to this question at all. At p. 710 Lord Shaw says: "Take, again, an attendant in an asylum placed in charge of dangerous lunatics. He is aware that at any moment not one but all of those over whom he has control may individually, or in combination, turn and injure him. I do not think it would be in any sense straining the popular meaning of the words to say that such an attendant had been injured by accident arising out of and in the course of his employment. Such accidents, in short, spoken of in that general language, were the very things that were taken account of as possible when he made his contract of service"; and he refers to the case of *Anderson* v. *Balfour* (1), of which he approves. There is no reference to the matter in Lord Parker's judgment. As to the judgments of the dissenting Lords, all I would say is

(1) [1910] 2 I. R. 497.

that there is certainly nothing in them that in any way suggests disapproval of the test, which appears to me to be one that I may apply.

There is, however, another view of Lord Loreburn's judgment which appears to me to be reasonable, namely, that he wished to guard himself from a view that the contemplation of the parties might not be conclusive *in every possible case* on the subject of whether the accident in fact arose out of the employment. Speaking, however, with the utmost respect, if I am at liberty to say so, I do not think he intended to eliminate this consideration altogether. I thought when the case was before us that it was a case in which the parties might reasonably have contemplated the risk which was run, and I do not think that Lord Loreburn says anything in his judgment which would forbid one now to take that view of the case.

I am of opinion, accordingly, that I am at liberty to, and must, consider whether the risk with regard to the possible falling of part of a house, as this man was passing along the street, was one reasonably within the contemplation of either himself or his employer in connexion with the contract of service, either at its inception or at any time.

It would not have been necessary for me to have pursued this question at the length I have done were it not for the necessity of distinguishing another class of case which at first sight, and viewed without the aid of the principle to which I have referred, would appear to affect cases like the present, and which would be difficult to harmonize with the class of authority by which the Recorder considered he was bound.

The case of *Kelly* v. *The Kerry County Council* (1), which the Recorder considered ruled the present case, is reported in 42 I.L.T.R., p. 23. In that case a workman of the county council was compelled to work on the road breaking stones; a thunder-storm arose, and he was struck by lightning and killed. It was a case in which in one sense it might be said (and it was so argued) that he was exposed to a special risk of being struck by lightning, because his employment of necessity brought him on to the highway, and he was thereby exposed to a greater risk than a man who was not so employed, and that consequently the accident arose out of a risk which might be conceived as incidental to that employment. These considerations must have arisen and been present to the mind of the Court; but the Court unanimously held that the accident was not one arising out of the employment of the deceased, there being no evidence that in following his employment on the road during the thunder-storm "he ran any greater risk of being struck by lightning than any other person who was within the area of the storm." That case does not rest for its authority upon the mere decision of the Court of Appeal. In *Plumb* v. *Cobden Flour Mills Co., Ltd.* (1), Lord Dunedin, in delivering a judgment of the House which was concurred in without any qualification by the other noble Lords, expressly cites with approval the decision of the Court of Appeal, and points out the distinction between it and *Andrew* v. *Failsworth Industrial Society* (2), where the workman was exposed to a special risk because he was placed by reason of his employment in a position of special danger, and by reason of having to occupy that position of special danger he was struck by lightning, and that was a risk to which he was specially exposed, and was not common to all mankind.

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(1) 42 I. L. T. R. 23.

The English lightning case and *Challis' Case* (3) were considered in *Craske* v. *Wigan* (4). The injury in that case was caused by a cockchafer flying into a room where a maid was doing needlework; she threw up her hand to beat off the cockchafer, and injured her eye with the sewing-needle. In that case the Master of the Rolls said, and I am correcting his words as by himself directed in *Mitchinson* v. *Day* (5): "It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, and if I had not been in that particular place.'" That is to say, there must be something more; and he finds that something more in a quotation from his own judgment in *Challis' Case* (3), that the risk of such an occurrence is one "which may reasonably be looked on as incidental to the employment of an engine-driver," though it might not be incidental to other employments.

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(1) [1914] A. C. 62.

(2) [1904] 2 K. B. 32.

(3) [1905] 2 K B. 154.

(4) [1909] 2 K. B. 635.

(5) [1913] 1 K. B. 603, at p. 605.

In *Rowland* v. *Wright* (1), the stable cat case, there was on the facts as found, by reason of the employment, a danger from the bite of a cat, which was found to be an animal forming part of the ordinary stable equipment with which the workman was necessarily by reason of his employment brought in contact. It might have been otherwise if the cat had been what was commonly called a "strange cat," and then the case would have been decided on the same lines as the cockchafer case.

Warner v. *Couchman* (2) is another authority on this same line. In that case the risk to which the milkman was exposed was frostbite, and it did not enable him to succeed merely that while delivering milk his hand was frostbitten, because that was not a risk to which, on authority, he was specially exposed by reason of his employment. I thought in the course of argument that the case was of less authority by reason of the special finding of the county court judge, but I think it may fairly be classed with authorities like *Kelly* v. *The Kerry County Council* (3).

Now, in these cases there is no mention made in so many words of the principle which I conceive to exist, namely, that the risk must be one which might reasonably be in the contemplation of the parties, but they were dealt with by other forms of words, which are, that the workman was not exposed by reason of his employment to any greater risk than all mankind. This, to my mind, involves the proposition that the risks were not incidental in the sense that they were not reasonably in contemplation.

It is now necessary to refer to another class of case, which has undoubtedly to be reconciled with those with which I have just been dealing.

In *Pierce* v. *The Provident Clothing and Supply Co., Ltd.* (4), it was held that a collector and canvasser who, while riding a bicycle, and in doing so acting on his master's business, was

(1) [1909] 1 K. B. 963.
(2) [1912] A. C. 35.
(3) 43 I. L. T. R. 23.
(4) [1911] 1 K. B. 997.

knocked down by a tramcar, did meet with an accident which arose out of the employment, and the case of *McNeice* v. *Singer Sewing Machine Co.* (1) was followed.

The case which came before our Court, of *Cunningham* v. *Mahedy* (2), was even a stronger case in favour of the workman than *Pierce's Case* (3). In that case it was the duty of the servant to go on messages for his employer, and to cross the streets, placing himself in connexion with the traffic in a position of risk, just as in *Pierce's Case* (3). His master ordered him to do an errand which compelled him to cross the road, and he was struck by a vehicle and injured. I was one of the members of the Court that held that he was entitled. I conceived that the case was ruled by *Pierce's Case* (3) and *McNeice's Case* (1), and I still consider that to be so. In that case, referring to the words of Lord Dunedin in *Plumb's Case* (4), "a risk common to all mankind and not accentuated by the incidents of the employment," I said, "I think that if the risk is one common to all mankind, without any risk incidental to the employment, then the applicant's case fails. This man, when he met with the accident, was carrying out orders of his employer, which he was bound to do. He was bound to cross the street then and at all times. He was thereby exposed to the risk of being knocked down. All mankind is not in that condition of being obliged to cross at all times under the orders of a master" (and I would now add—and expose himself to that risk of being knocked down); and I added, "In a case like the present there is a risk common to all mankind, but where the person is bound to obey his master's orders and expose himself to a risk in crossing the streets on his master's orders and business, it seems to me the accident arose out of a risk incidental to the employment, and not common to all mankind. This accident is one to which all mankind is subject, but applicant must face the risk, and has no volition in the matter."

The question now arises, are these cases, including the judgment of our own Court, in any way irreconcilable with the decisions of our own Court, of the English Court of Appeal, and the House of Lords, beginning with the *Kerry Case* (1)?

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(1) [1911] S. C., p. 12.
(2) Unreported. C. A., 23 Feb. 1915.
(3) [1911] 1 K. B. 997.
(4) [1914] A. C. 62.

In *Cunningham* v. *Mahedy* (2) I did not advert to this matter of risks which might reasonably be contemplated by the parties. The facts of the case did not seem to me to render it necessary. I thought it was a clear case in which there was an added risk, or that the risk was accentuated, but it appears to me that that case of *Cunningham* v. *Mahedy* (2), *McNeice's Case* (3), and *Pierce's Case* (4), were all cases in which the parties might reasonably have contemplated the existence of the risk. The risks were ordinary street risks, but anyone would have seen that where, in the discharge of his duty, the servant had to face in carrying out his master's orders these ordinary street risks, they were risks which might reasonably have been in contemplation; while in the cockchafer case, the case of a workman stung by a wasp, and other cases of the same kind, there was an entire absence of evidence which would have made such contemplation possible.

Now, let us come to the present case in the light of this condition of the authorities. Whether the accident is one caused by a natural cause, or whether it arises from something happening by reason of the existence of artificial conditions, does not seem to be at all a possible point of differentiation. An attempt was made to suggest that there was such a distinction in *Mitchinson* v. *Day* (5), but it was abandoned and treated by the Master of the Rolls, at p. 606, as being without any warrant; and, indeed, he says that he thinks the contrary had been established.

It was accordingly very well put by Mr. Sullivan in his argument: "If this poor man had been struck by lightning when passing through Abbey Street, could it be said that the *Kerry Case* (1) did not apply? If the coping had fallen by reason of being struck by lightning, where is the difference?" Some natural cause of some kind involving the law of gravity caused this parapet to fall, but how can it be said that the workman was, any more than in the lightning case, exposed to a risk more than

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(1) 42 I. L. T. R. 23.
(2) Unreported. C. A., 23 Feb. 1915.
(3) [1911] S. C. 12.
(4) [1911] 1 K. B. 997.
(5) [1913] 1 K. B. 603.

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other members of the community? He cited a case of *Kinghorn* v. *Guthrie* (1). In that case it was held that a carter, who, when leading a horse and lorry out of his employer's yard in the course of his employment, was struck by a piece of corrugated iron blown by a high wind off the roof of a building adjoining his employer's yard, was not entitled to recover, the accident not arising out of his employment." Lord Salvesen says (p. 890): "The workman is not specially exposed to that risk because of his employment. It may be that the locality is one which is windy, or it may be a locality where the houses are less substantial than they are in other parts of the town; but that is not a risk arising out of his employment, for any person frequenting the yard would be exposed to exactly the same risk. It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work, but, as the Master of the Rolls says, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind."

That case may not be binding on me as an authority, but it certainly expresses what is passing through my own mind with regard to the case before us. Still, however, it is necessary to reconcile the class of cases of which this is an example with those in which it has been held that the workman is exposed to an accentuated risk by reason of his having to face certain normal and ordinary street dangers.

I believe that I find in the principle laid down in *Collins* v. *Collins* (2), namely, that it is legitimate to consider whether the accident is one arising from a risk reasonably contemplated by the parties, a solution of the difficulty. It must be a risk incidental to the employment, and it cannot be regarded as incidental if, on the application of this test, it is found non-existent.

Applying it to the present case, I get an answer unfavourable to the workman. I get the same answer as in the lightning case and all the other authorities following on the same line; and for these reasons I consider that the learned Recorder was right in holding that there was no evidence before him showing that this man was exposed to any accentuated risk, or any risk incidental to his employment.

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(1) 6 Butt. 887.

(2) [1907] 2 I. R. 104.

PALLES C.B. concurred.

RONAN L.J.:—

I agree with the judgment of the Lord Chancellor.

Section 13 of the Act provides that in the Act workman means "any person who has entered into or worked under a contract of service with an employer." It seems to me that it follows from this that the employment in sect. 1 must mean the employment the subject-matter of this contract of service, and that the scope and extent of the employment must depend on the terms, express or implied, of this contract. Entering the employment must mean becoming party to or agreeing to be bound by such a contract of service. This contractual relation is the basis of the jurisdiction under the Act, and it seems to me very important to bear this in mind when considering sect. 1.

If I am right in this, it follows that "arising out of and in the course of the employment" are words referring to the subject-matter of a contract.

There have been many statements as to the effect of these words. I take that of Cozens Hardy M.R. in *Craske* v. *Wigan* (1), as it has been applied by the House of Lords in *Plumb's Case* (2):— "It is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in that employment,' or (changed to 'and' by the Master of the Rolls in *Mitchinson* v *Day* (3)), 'if I had not been in that particular place.' He must go further and must say:—(A) 'The accident arose because of something I was doing in the course of my employment, or' (B) 'because I was exposed by the nature of my employment to some peculiar danger.'" Now, as I shall show hereafter, it is quite plain that the present case is not within (A). The inquiry, therefore, must be whether it comes within (B). This is sometimes expressed in the form of "a risk incidental to the employment"; sometimes "a risk to which, by the conditions of employment, the workman was specially exposed."

(1) [1909] 2 K. B. 635. (2) [1914] A. C. 62. (3) [1913] 1 K. B. 603.

This latter statement is taken from Lord Dunedin's judgment in *Plumb's Case* (1), which was adopted by the other members of the House of Lords. It seems to me that by "conditions of employment" must be understood "duties under the contract of service."

I must now refer to a decision of this Court which I think has a most important bearing on the present case.

In *Collins* v. *Collins* (2) the deceased was employed as foreman in certain sewage works by the respondent, who was the contractor for the works. Certain pipes which had been laid in the street were maliciously broken by fishermen. The respondent asked the deceased to protect the pipes while the respondent was at dinner. Another pipe was then broken. On his return the fishermen were asked to pay for the damage, and an altercation arose, in the course of which the respondent was struck and fell. The deceased came to his assistance, was stabbed, and died.

The Court consisted of Walker L.C. and FitzGibbon and Holmes L.JJ. Of that Court Lord Halsbury said in *Johnston* v. *O'Neill* (3): "I should be disposed to place the greatest reliance on such a Court . . . Of one of them, FitzGibbon L.J., I cannot speak without considering the many occasions upon which I have had to recognize the wisdom and learning which he has ever exhibited on the Bench, and I cannot mention his name without saying how deeply I regret the loss the Irish Bench has sustained of one whose learning and acuteness might have been an example to any country in which such qualities were valued."

In *Collins* v. *Collins* (2) the Court held that the accident did not arise out of the employment. There is no possible mistake as to the principle of the decision. It is summed up by Lord Justice FitzGibbon in these words: "I cannot understand how an occurrence could arise out of and in the course of a particular employment, unless it was something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. It could not reasonably have been contemplated by either the employer or the employed in this case, that amongst the risks incidental to the employment was that of the workman's being stabbed, as he was, in a drunken quarrel. That being so, the injury was not incidental to the employment, and the appeal must be allowed." Holmes L.J. concurred. Walker L.C. had already given judgment to the same effect, and shown that this principle was contained in the judgment in *Challis's Case* (1). Now, unless the law as laid down and applied in this case has been subsequently varied, we must take it as binding upon us in the present case. The vital words are: "Might have been contemplated by a reasonable person when entering the employment as incidental to it."

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(1) [1914] A. C. 62.
(2) [1907] 2 I. R. 104.
(3) [1911] A. C., p. 567.

Mitchinson v. *Day* (2) was a case of the same class as *Collins* v. *Collins* (3). The latter case was referred to, first by Hamilton L.J. and then by Cozens Hardy M.R., during the argument, and by Buckley L.J. in his judgment. The case was decided on the ground that "the risk was not incident to the employment." There was no suggestion that the judgment of FitzGibbon L.J. was not absolutely correct. It is a remarkable feature in *Mitchinson* v. *Day* (2) that the evidence of people in the class of employment in the case (that of carter) was taken on the question whether "the risk was incident to carting," and Hamilton L.J. based his decision partly on this evidence (p. 611).

During the argument I asked counsel if he could suggest any definition of "risks incidental to the employment" except that contained in *Collins* v. *Collins* (3), and he replied that he could not. I also asked if he could point to any case inconsistent with the judgment in *Collins* v. *Collins* (3). The judgment of Lord Loreburn in *Trim Joint District School Board of Management* v. *Kelly* (4) was the only matter he could suggest. In that case it was argued that "the injury to the deceased was caused while he was discharging his duty, and because he was discharging his duty, and by the persons whom it was his duty to control. This is a typical case of injury arising out of the employment, and it can be disposed of on the language of the Act itself without any gloss." The gloss referred to the propositions to be found in certain of the cases, as to "contemplated risk" and "risk

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(1) [1905] 2 K. B. 154.
(2) [1913] 1 K. B. 603.
(3) [1907] 2 I. R. 104.
(4) [1914] A. C. 667.

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incidental to employment," and it was argued that none of them were to be found in the Act.

The statement of the law by Cozens Hardy M.R. in *Craske* v. *Wigan* (1) was strongly relied on, viz.: "He must go further, and must say, (A) 'The accident arose because of something I was doing in the course of my employment, or' (B) 'Because I was exposed by the nature of my employment to some peculiar danger.'" (*Plumb's Case* (2), where the House of Lords had adopted this, had not then been reported.) It was urged that the case was within the very terms of (A). In *Craske* v. *Wigan* (1), Buckley L.J. says in his judgment: "It" (the accident) "was not due to any cause attributable to her employment as lady's maid." This shows that *Craske* v. *Wigan* (1) was decided on the ground that the case was not within (A). It was, therefore, necessary to ascertain if it was within (B). If it had been within (A) there would have been an end of the matter, and there would have been no necessity to discuss (B) as to peculiar risk. Now, it was strongly argued in the *Trim Case* (3) that it was within (A), and that this rendered it unnecessary to consider any further question as to (B).

Lord Loreburn said: "I cannot attach weight to another argument of Mr. Sankey, that the risk of being killed by schoolboys is not to be regarded as incidental to or arising out of a schoolmaster's employment because no one would contemplate so extraordinary an occurrence. This argument illustrates the danger of trying to convey what an Act means by using expressions which are not found in it. I do not repent of having myself, as have other judges, in trying to convey my thoughts, spoken of risks incidental to an employment, but that does not mean merely risks which ordinarily occur in it. . . . The words are 'arising out of.' Whether a particular mishap is likely to occur or likely to be feared or foreseen, seems to me a different inquiry. In inquiring whether or not an injury by accident in fact arises out of the employment, it surely is unnecessary to ask whether such a thing has ever happened before or is likely to happen again within, say, a hundred years or, for that matter, for ever. It may happen, and has happened, and it has happened because

(1) [1909] 2 K. B. 635.

(2) [1914] A. C. 62.

(3) [1914] A. C. 667.

the poor man was a schoolmaster. The event has proved that it arose out of his employment. I can see no reason for saying that there is to be compensation *only* when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer or by a county court judge. All this has, in my view, no conclusive bearing on the simple question, Did it in fact arise out of the employment?"

Now these remarks were made in a case in which Lord Loreburn says: "The event has proved that it arose out of his employment." That is, the injury was brought about by the performance by the deceased of his duty in the employment. In such a case, he says, it is unnecessary to consider whether it was contemplated or not. This consideration is not conclusive in all cases, not in the case then before him.

But these remarks of his appear to me to have no practical bearing where the employment and the conduct of the workman therein had nothing to say to the cause of the injury. In the present case, neither the employment nor the conduct of the workman therein had any connexion, direct or indirect, with the fall of the parapet. There is no pretence for saying that "the event has proved that it arose out of the employment."

The Lord Chancellor and Lord Reading held, in the *Trim Case* (1), that the accident arose out of the employment, but did not discuss the matter in detail. Lord Shaw held that it did so arise, but on the ground, as will appear from a careful reading of pp. 709, 710, and 711 of his judgment, that there was evidence that the accident was of a class that was taken into account when he made his contract of service.

On the other hand, Lord Dunedin held that the accident did not arise out of the employment, on the ground that there was not "any evidence that there was any risk of a deliberate conspiracy to attack" (p. 691).

Lord Atkinson said, at p. 704: "There was nothing in that history" (of the school) "to lead anyone to anticipate that an attack such as was made upon the deceased would ever be made. I have, therefore, great difficulty in coming to the conclusion that

(1) [1914] A. C. 667.

the risk of such an outbreak of violence taking place was a risk reasonably incidental to the deceased's employment." This appears to me a complete adoption of the judgment of FitzGibbon L.J., and of the Court, in *Collins* v. *Collins* (1), though that case was not cited.

At p. 718 Lord Parker says: "I hesitate to come to that conclusion" (*i.e.*, that the accident arose out of the employment). "It would, I think, be a libel on the industrial schools of the United Kingdom to say that an assistant master runs any special risk of being assaulted or murdered, much less any special risk of being the victim of a deliberate conspiracy to assault or murder."

It thus appears that four out of the seven Lords practically applied the rule as to risks incident to the employment and capable of being reasonably contemplated. Two did not discuss the question, and I think I have shown that even Lord Loreburn's remarks would not apply to such a case as the present. They were really a development of proposition (A) in *Craske* v. *Wigan* (2), and have no application to a case such as this, which is entirely outside proposition (A).

In this Court in the *Trim Case* (3) O'Brien L.C. says:—"I think the decision of the English Court of Appeal in *Nisbet* v. *Rayne* (4) was that a murderous attack might be such an untoward occurrence as to be reasonably in contemplation as incidental to the employment."

Holmes L.J. says:—"That it arose 'out of the employment' turns entirely upon this: whether a person taking the position of assistant master in such a school as this does so at a risk." This clearly means a risk that may be reasonably contemplated.

Under these circumstances, I think it is impossible to say that the principle of *Collins* v. *Collins* (1) has ever been overruled or, indeed, questioned.

In the latter cases it is true the term "risk incidental to the employment" is more frequently used, but never, as far as I can see, in any sense inconsistent with the judgment in *Collins* v. *Collins* (1).

I therefore take it as binding us, at all events in all cases not within proposition (A) in *Craske* v. *Wigan* (1), and therefore in the present case.

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(1) [1907] 2 I. R. 104.
(2) [1909] 2 K. B. 635.
(3) C. A., 6 May, 1913.
(4) [1910] 2 K. B. 689.

In *Plumb's Case* (2) Lord Dunedin (whose judgment was concurred in by all the Lords present) described the propositions laid down by Cozens Hardy M.R. in *Craske* v. *Wigan* (1) as being "very accurately expressed."

Now, as the present case is not within (A), we must see if it is within (B), *i.e.*, Was the workman "exposed by the nature of his employment to some peculiar danger"? Lord Dunedin says, as regards the second branch, *i.e.* (B):—"A risk is not incidental to the employment when it is not due to the nature of the employment." Illustrations of this, he says, "will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustrations the two lightning cases of *Kelly* v. *Kerry County Council* (3) and *Andrew* v *Failsworth Society* (4), where on the facts the stroke of lightning was held, in the Irish case, to be a common risk of all mankind, in the English case a risk to which, by the conditions of the employment, the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided": *Plumb's Case* (5).

The real question here appears to be whether the risk of part of a house falling on the workman, a risk common to all mankind, was in this case "accentuated by the incidents of the employment."

Now a risk common to all mankind may be accentuated in two ways:—

(1) The workman may be exposed to the risk in different manner from other people. His risk at the time of the accident may have been greater in kind than that of the public.

(2) His risk at the time of the accident may have been the same as that of other people, but he may have been exposed to the

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(1) [1909] 2 K. B. 635.

(2) [1914] A. C. 62.

(3) 42 I. L. T. R. 23.

(4) [1904] 2 K. B. 32.

(5) [1914] A. C. 62, at pp. 68, 69.

risks for periods of time substantially different from the exposure of ordinary people.

I take the following cases :—

Non-accentuated risks: (1) Risk of being struck by lightning. A road-mender on the roads all day: *Kelly* v. *Kerry County Council* (1), approved of by the House of Lords in *Plumb's Case* (2). (2) Frostbite. A van-driver out all day delivering bread, and having to take off his glove frequently: *Warner* v. *Couchman* (3). Accentuated risks: (3) Lightning. A man working on a scaffold; decided on the ground that he "was exposed to something more than the normal risk which everybody incurs at *any time*, and in *any place* during a thunder-storm" (per Collins M.R.: *Andrew* v. *Failsworth Industrial Society* (4)), approved of by the House of Lords in *Plumb's Case* (2).

These cases would seem to suggest that an "accentuated risk" requires something in the nature of a difference in the *risk itself* from that incurred by the public; and that the fact that the workman was exposed to the same risk as other people, but for much longer periods, would not be sufficient. This, however, is apparently not so, though I can find no case dealing with this in the House of Lords.

In the two bicycle cases the man was on a bicycle. In *Martin* v. *Lovibond* (5) he was driving a dray. In *Pierce* v. *Provident Clothing and Supply Co.* (6), the Master of the Rolls (p. 1001) adopts the statement of the Lord President in *McNeice* v. *Singer Sewing Machine Co.* (7), "And I think, therefore, that a danger which is an ordinary danger of the street—and I think we are entitled of our own knowledge to know that the behaviour of a passing horse is one of the ordinary dangers of the street—is therefore a danger arising out of his employment." The Master of the Rolls then adds: "I think that this man was more exposed than other people. His employment exposed him to the risks of the street practically all day long. . . ." And further, as to the bicycle, he says, "I think there is nothing in the point that this permitted mode of going from place to place might possibly be more risky than going on foot."

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(1) 42 I. L. T. R. 23.
(2) [1914] A. C. 62.
(3) [1912] A. C. 35.
(4) [1904] 2 K. B. 32.
(5) [1914] 2 K. B. 227.
(6) [1911] 1 K. B. 997.
(7) [1911] S. C. 12.

Buckley L.J. compares the case to that of a railway guard, saying: "His employment involves that he shall run daily and hourly a risk which a passenger runs occasionally."

The man was not directed to use the bicycle in the English case.

In *Martin* v. *Lovibond* (1), at p. 231, Cozens Hardy M.R. states the law thus:—"Then it is said, and in truth, that the accident must arise not merely 'in the course of,' but 'out of the employment,' and that this man was no more exposed to the risk of being knocked down by a motor-car than any other member of the public. I cannot assent to that. His duties as a drayman involved his being from eight in the morning till eight at night more or less actually in the streets of London, spending his life in the streets of London. It seems to me to bear the strictest possible analogy to the bicycle case, *Pierce* v. *Provident Clothing and Supply Co.* (2), where we held that a man who is exceptionally exposed to street accidents is entitled to claim in respect of such an accident as arising out of his employment, although an ordinary member of the public not so exceptionally exposed would not be so entitled."

No doubt, in these cases, the bicyclist and the drayman were permanently in the carriage-way, and therefore more exposed to the danger of being run over than a pedestrian who merely used the foot-paths. Still, I think this was not the principle of the decisions, and that this appears from the passages I have quoted. These cases were recognized as law in *Jibb* v. *Chadwick* (3). In that case the workman had a season-ticket to take him to and from his work. He was killed trying to get into a moving train. It was held that this fact was an added risk to which he had exposed himself. Swinfen Eady L.J. said: "If his occupation required him to use the railway more than most people, and by reason thereof he is to be regarded as having been specially exposed to the risks of railway travelling (like the commercial traveller in *Pierce* v. *Provident Clothing and Supply Co.* (2)) to street risks of a cycle), still the risk of entering a train in motion . . . cannot be included or regarded as one of the risks of railway travelling . . . The peril *involved by the deceased's contract of service* was to travel by the train in the ordinary way. He exposed himself to an added risk or peril which was not incidental to his employment." This is the last case I have found on the subject.

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(1) [1914] 2 K. B. 227.

(2) [1911] 1 K. B. 997.

(3) [1915] 2 K. B. 94.

I can find no reported case applying the principle of these cases to a pedestrian.

In the recent case of *Cunningham* v. *Mahedy* (1), however, we thought that the principle of these cases did apply to the case of a messenger on foot who had to spend a considerable portion of his time on the streets of Dublin. I suggested there the case of a shop having branches at opposite sides of a street with great traffic, and a man employed mainly to take messages from one branch to the other. I ventured to say that it was absurd to suggest that, in the case of this man, who had continually to cross the street, the ordinary street risk of being run over, common to all mankind, was "not accentuated by the incidents of the employment." That once admitted, it was a question of degree, and we thought there was ample evidence to justify the county court judge in arriving at the conclusion that the employment exposed the man to ordinary street risks to a real and substantial extent exceeding that of the general public.

It has been strongly argued in the present case that the principle of that decision was, that if a man's employment compels him to be in the streets for long periods, any accident that happens to in him the street arises out of his employment. Now, it is plain from *Warner* v. *Couchman* (2) and *Kelly* v. *Kerry County Council* (3) (the one a decision of, the other adopted by, the House of Lords) that this is not so. What, then, is the principle of the distinction between these cases and the bicycle cases, and the drayman's case, and *Cunningham's Case?* (1)

In the latter cases the danger of being run over in the street was a real, patent, obvious risk—something, in the words of FitzGibbon L.J., in *Collins* v. *Collins* (4), "the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it." In the other two cases the danger of being struck by lightning and the danger of frost-bite were not things the risks of which would be so contemplated by a reasonable person; the risks were too remote and exceptional in their nature. I can really find no other principle to distinguish the cases.

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(1) Unreported. C. A., 23 Feb. 1915.
(2) [1912] A. C. 35.
(3) 42 I. L. T. R. 23.
(4) [1907] 2 I. R. 104.

In the passages I have quoted from the judgments in *Pierce* v. *Provident Co.* (1) and *Martin* v. *Lovibond* (2) the terms "ordinary dangers of the streets," "street accidents," are used. I think these must be taken to mean accidents of the class which might reasonably be taken into consideration at the time of the making of the contract of service, and as excluding all others.

The principle of *Collins* v. *Collins* (3) is, in my opinion, binding on the Court, and it enables us to distinguish the authorities in the way I have tried to explain. I think we should apply it to this case.

If we do so, it is, I think, impossible to hold that a man employed as a street messenger would ever dream of contemplating the risk of a house falling on him as incidental to his employment.

In my judgment the appeal should be dismissed on the grounds:—

1. That the accident did not arise because of something the man was doing in the course of his employment.
2. That it was not an ordinary street accident, or one the risk of which might have been contemplated by a reasonable man when entering the employment as incidental to it.
3. That it is not enough for the applicant to say that "the accident would not have happened to me if I had not been engaged in that employment, and if I had not been in that particular place."
4. That the Recorder was right in the view he took of the case.

Solicitor for the appellants: *D. A. Quaid.*

Solicitors for the respondent: *Cussen & Kieran.*

R. ST. J. C.

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(1) [1911] 1 K. B. 997. (2) [1914] 2 K. B. 227. (3) [1907] 2 I. R. 104.

IRISH INSURANCE COMMISSIONERS, Appellants; J. WALKER CRAIG K.C., Recorder of the City of Belfast and County Court Judge of the County of Antrim, Respondent (1).

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National Insurance—National Insurance Acts, 1911 *to* 1913 (1 & 2 *Geo.* 5, *c.* 55 ; 3 *&* 4 *Geo.* 5, *c.* 37)—"*Employed Contributor*"—*Crier of Recorder's Court and of County Court.*

The crier of a Recorder's Court, or County Court, is not employed under a contract of service with the Recorder or county court judge, and the Recorder or county court judge is not therefore liable to contribute in respect of such employee under the provisions of the National Insurance Acts, 1911 to 1913 (2).

The nature of the office of crier considered.

Case Stated under 20 & 21 Vict. c. 43, by Mr. Garrett Nagle, resident magistrate of the city of Belfast.

The appellants, as complainants, issued a summons against the respondent, who was Recorder of the city of Belfast and county court judge of the county of Antrim, charging that the respondent had failed to pay a contribution under the National Insurance Acts, 1911 to 1913, in respect of one Samuel G. Donaldson, an employed contributor within the meaning of those statutes.

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(1) Before Cherry L.C.J. and Boyd J.

(2) Criers of county courts have been dealt with by the Commissioners by the National Health Insurance (Subsidiary Employments) Consolidated Order (Ireland), 1914. *Dublin Gazette*, July 31st, 1914, at p. 1360. That Order, made pursuant to the National Insurance Act, 1911, declares that "the employments of the several classes set forth in the first schedule hereto are specified as being of such a nature that they are ordinarily adopted as subsidiary employments only and not as the principal means of livelihood." Persons in such employments are under sub-s. 2 of sect. 1 of the National Insurance Act, 1911, and paragraph 1 of Part II of the first schedule, not persons employed within the meaning of Part I of that Act.

The first schedule to the Order, Part II, includes in "Employments involving occasional attendance only," "Crier at sittings of the judge or registrar of a county court." [Rep.]

At the hearing, on the 15th April, 1915, both appellants and respondent were represented, and evidence was given by Samuel G. Donaldson, who was crier of the Recorder's court and also crier of the civil-bill and quarter sessions courts of the county of Antrim. Mr. Nagle dismissed the case on merits with costs, and his findings and decision were stated in the case as follows:—

"Two questions were submitted to me for consideration. First, is the crier, Samuel G. Donaldson, an employed contributor, under a contract of service, express or implied, within the meaning of Part I, sect. 1, sub-sects. 1 and 2, and First Schedule, Part I (*a*), of the National Insurance Act, 1911? and, if that question be answered in the affirmative, secondly, is the Recorder his employer within the meaning of the Act, and, as such, liable for the contributions, and, if he is not the employer, who is?

"As to the first question I was of opinion that Samuel G. Donaldson was an employed contributor, under a contract of service, within the meaning of Part I, sect. 1, sub-sects. 1 and 2, and First Schedule, Part I (*a*), and that he does not come within the exceptions under Part II, First Schedule.

"The question remains—Is the Recorder his employer, and, if not, who is?

"The facts were admitted. Samuel Donaldson stated in his evidence that he was appointed by the Recorder, on his coming to Belfast, crier in the Recorder's court for the city, and also as county court crier for the county of Antrim; that he performs no duties for the Recorder over and above what might be required of him in connexion with the court; that he is paid nothing by the Recorder and was in no sense his personal servant, though the Recorder had, of course, the power of dismissing him; that he was paid by the Corporation of Belfast. His salary was originally £20 per annum, but it was subsequently raised to £50 per annum on a representation that practically his whole time was taken up in duties connected with the Recorder's and Registrar's courts and the county court. He further stated that he was paid £10 per annum by the county council of Antrim, and that these sums, together with some small fees, represented his whole means of livelihood.

"In this connexion the Recorder occupies a dual capacity. He is Recorder of the city of Belfast and county court judge and chairman of quarter sessions for the county of Antrim. Under sect. 177 of the Municipal Corporations Act, 1840, as Recorder he appointed the crier, originally a common law officer, for the city, and the corporation paid the salary. The words of the section are: 'The Recorder shall appoint such officers and servants as are necessary for carrying on the business and executing the process of the court.' These words are mandatory, and throw an obligation on the Recorder, and should it be held that he was the employer, then a singular and unique position might one day arise, in the improbable, but still possible, case of the crier refusing to refund his share of the weekly contributions paid for him by the Recorder, as the Recorder's only means of recovering the amount, not having any fund from which to deduct it, would be by civil bill at his suit against the crier, in his own court (Schedule 3, par. 4).

"In the county of Antrim the crier is appointed by the judge, acting as county court judge and chairman of quarter sessions. Under the Grand Jury Act, sect. 110 and Schedule S, the Grand Jury were authorized to make a presentment for the crier's salary, and by a provision in that section, the Grand Jury had power, 'with the express sanction of the court but not otherwise,' to present for a lesser sum, or to refuse to make any presentment whatsoever in case of any neglect or insufficient discharge of duty on his part; but, under the Adaptation of Enactments Order, 1899, Local Government Board Order, Local Government Act, 1898, which applies the above section to county councils, the words 'with the express sanction of the court' are left out. This seems to me to give the county council a large measure of control over this officer.

"The Insurance Act makes insurability an incident of the contract of service, and the true test for this purpose as to who is the employer, according to the case of *McKinnon* v. *Whitecross* (1), referred to in the text-books, is not so much who controls, as with whom did the man contract, and to whom does he look for pay. I was of the opinion, from the facts and circumstances of this case, that there is an implied contract of service between the Corporation of Belfast and the crier, Samuel G. Donaldson, and an implied contract of service between the county council of Antrim and Samuel G. Donaldson, and that these bodies, and not the Recorder and county court judge, are his employers, and, as such, liable proportionably for the contributions. I accordingly dismissed the case on the merits with 20*s.* costs.

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(1) [1909] S. C. 373.

"And hereupon the judgment of the Court is required as to whether I, the said justice, was correct in point of law in my determination as aforesaid, or as to what should be done in the premises."

R. Sheehy (with him the *Solicitor-General* (*James O'Connor K.C.*)), for the appellants :—

The crier of the Recorder's court is appointed by the Recorder under the provisions of the Municipal Corporations (Ireland) Act, 1840 (3 & 4 Vict. c. 108), sect. 177. There is no statutory provision as to the appointment of the crier of the county court. In the case of the latter the practice is for the county court judge to make the appointment. In both courts the crier is dismissed by the judge. Of the elements of employment those of the appointment to and dismissal from the situation are thus vested in the respondent.

The payment of the crier is regulated by statute. In Schedule S to sect. 110 of the Grand Jury Act, 1836, 6 & 7 Wm. 4, c. 116, "the crier of the Court" is mentioned amongst other persons. Under sect. 4 of the Local Government Act, 1898, and s. 110 of the Grand Jury Act as adapted by the Adaptation of Enactments Order, 1899, the provisions of Schedule S are adopted, and as a consequence the crier is paid either by the county council or by the corporation. The payment is not in the hands of the respondent.

The only question here is whether there is a contract of service between the respondent and Donaldson: National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), sect. 1 and schedule. The crier is controlled in his actions by the respondent, and he is appointed and dismissed by the respondent. The only element generally found in contracts that is absent is that of payment; but it is not

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necessary that the respondent should pay Donaldson. In the case of *Fletcher Moore* v. *The Irish Insurance Commissioners* (1) the school-teacher was held insurable, and the manager of the school, who appointed and could dismiss the teacher, was held liable to contribute although the teacher's salary was paid by the National Board. The test of "employment" in the relation of master and servant is stated by Crompton J., in *Sadleir* v. *Henlock* (2), as being whether the alleged employer retained the power of controlling the work. Donaldson stated here that he was under the control of the respondent. The observations of Cozens Hardy M.R., and of Buckley L.J., in *Simmonds* v. *Heath Laundry Co.* (3) are in point.

J. M. Whittaker and *R. F. Harrison K.C*, for the respondent :—

There are two questions for decision : (1) Was there any contract of service under which Donaldson was employed ? (2) If there was such contract, was it with the respondent ?

There was no contract of service. The respondent appointed a person to fill an office, a common law office recognized by the law.

[CHERRY L.C.J. :—Does the Act of 1913 at all affect this case ?]

It cannot, for it merely adds, as insurable persons, persons engaged in employments under any local or other public authority. A common law office could not be such an employment, and, even assuming that it could, the respondent is not a local or other public authority ; if the respondent is liable to contribute, he can only be liable under the Act of 1911 as the employer under a contract of service express or implied. Possibly the corporation of the city or the county council could be the employers of Donaldson under the Act of 1913, but it is clear that the respondent cannot be such employer.

The crier has been from time immemorial an officer of the court. There is no trace when this office was created. The office is referred to in "Britton," in 1292, and in 1541 in the 33 Hen. VIII, c. 12. The crier is always referred to as an officer of the court. In the administration of justice there are various officers of the court: (1) Judges; (2) Registrars and Clerks of the Court; (3) Criers, who have separate and distinct duties regulated by the common law. The appointment by the judge is a mere exercise of patronage. The judge appoints the individual, but appoints him to an office in which he carries out duties prescribed by law.

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(1) See *post*, p. 70.

(2) 4 E. & B. 570, at p. 578.

(3) [1910] 1 K. B. 543.

The court of quarter sessions originally had no civil jurisdiction. It has no civil jurisdiction to this day in England. The crier of that court is an officer of the court. Up to the year 1796 civil bills in Ireland were heard before the judge of assize as a court of first instance, the appeal being to the next judge of assize. It was one of the articles of Strafford's impeachment that he encouraged that practice. In 1796 the civil bill was introduced to quarter sessions, and the assistant barrister was first appointed: 36 Geo. III, c. 25. By section 6 of that statute the assistant barrister was empowered to hear "English" bills not exceeding £20. That was the foundation of the civil jurisdiction of the quarter sessions, popularly called the "county court," and it would appear that when this jurisdiction was founded, the crier of the quarter sessions court was an existing official, and continued as an official of the new civil court. The crier is not referred to in any statute before the Grand Jury Act, 1823. By the 14 & 15 Vict. c. 57, s. 2, it was provided that the assistant barrister should be the chairman of the justices at general quarter sessions. We thus have three stages: (*a*) the old quarter sessions court; (*b*) the civil jurisdiction given to the assistant barrister at quarter sessions; (*c*) the assistant barrister made chairman of quarter sessions. Before the civil-bill jurisdiction was created, the crier existed as an officer of the quarter sessions court. In the Grand Jury Act, 1823, 4 Geo. 4, c. 43, by section 1, presentments for the salaries of "officers and persons mentioned in the table to this Act" were provided. The table referred to specifies salaries for judges' criers, and criers at sessions, and is entitled "Table of Classification of Counties and Salaries of County Officers." That statute and table were repealed and replaced by an enactment and schedule in similar terms by the Grand Jury Act of

1836, 6 & 7 Will. 4, c. 116, s. 110, and Schedule S, by which the grand jury was directed to present for salaries of the persons mentioned in Schedule S, not exceeding a specified amount, and were empowered, with the express sanction of the court, to present any sum less than one moiety of the specified salary, or to withhold or refuse any presentment. Schedule S, under a "Table of Salaries of County Officers," provides for the salaries of "judges' criers," and "criers at sessions." In the Schedule to Part II of the Adaptation of Enactments Order, 30th January, 1899, section 110 of the Grand Jury Act, and Schedule S, are adapted by providing that the salaries of the officers specified in Schedule S shall be paid by the county council. The crier has become a county officer, and his salary is controlled by the council. The Municipal Corporations Act of 1840, under which the crier of the Recorder's court is appointed, only deals with civil jurisdiction; in any case it only provides for the appointment to the office, and does not alter the nature of the office itself.

In *Fletcher Moore* v. *The Irish Insurance Commissioners* (1), there was more than the appointment and dismissal of the teacher; there was an actual contract proved. If the appellants' contention be correct, it results in making every person an employer who, by the duty of his office, has the power of appointing and dismissing.

In *In re Employment of Church of England Curates* (2), Parker J., at p. 569, with reference to the position under the Insurance Acts of a curate who was bound to obey the incumbent, says: "The duty which he owes to the vicar is not a duty which he owes because of contract, but a duty which he owes to an ecclesiastical superior." So the duty of obedience here owed by Donaldson is his duty as an officer of the court, and not his duty as an employee under a contract of service with the respondent.

In *Murphy* v. *Enniscorthy Guardians* (3), it was held that a dispensary doctor employed under the guardians was under no contract of service with the guardians. In the case of the *Officers of the South Dublin Union* (4), O'Connor M.R. held that officers of a poor law union were not employed under a contract of service within the meaning of Part 1, Schedule 1, of the National Insurance Act, 1911. The subsequent Act of 1913, providing that persons employed under any local or other public authority should be insured, shows that the decision of the Master of the Rolls was right. The later statute does not affect this case, which must be decided on the law applied by O'Connor M.R., and the reasoning and law in his judgment are conclusive of this case.

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(1) See *post*, p. 70.

(2) [1912] 2 Ch. 563.

(3) [1908] 2 I. R. 609.

(4) [1913] 1 I. R. 244.

The Solicitor-General in reply:—

The question the appellants desire to have decided is whether Donaldson is capable of being an employed contributor at all. The words of the amending statute of 1913 are very wide, and the respondent in his public capacity might possibly be held to be a public authority.

Cherry L.C.J.:—

This is a case stated by Mr. Nagle, resident magistrate of Belfast, for the purpose of determining whether the respondent, who is Recorder of the city of Belfast and county court judge of county Antrim, is liable to pay contributions under the National Insurance Acts, 1911 to 1913, as employer of the crier of his court.

The office of "crier," as has been pointed out in the argument, is one of very great antiquity. No one knows when it began, and it may be considered as being a common law office, there being no statute by which it was created. In practice the county court judge appoints the crier of his court. The office of crier is first mentioned in an Act of 1823, 4 Geo. 4, c. 23, and is now governed, as to payment, &c., by sect. 110 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116. That section, as applied by the Adaptation of Enactments Order, 1899, mentions the "crier of the court," in addition to a number of other subsidiary officers, in the schedule. The salary of the crier of the county court is paid by the county council; that of the crier of the Recorder's court by the corporation of the city of Belfast.

The office of "crier" in the Recorder's court is a little different from the office of crier in the county court. The crier of the Recorder's court is appointed under sect. 177 of the Municipal Corporations (Ireland) Act, 1840. The appointment is vested in the Recorder, who, as I understand, also exercises the power of dismissal, as does the county court judge in relation to the crier of his court. Except for this one difference, that the former is a statutory office and the latter is a common law office, the conditions of the office of crier in the Recorder's court are the same as those of the crier in the county court.

On these facts, two points arise for decision. First, is the crier of the court an "employed contributor" within the meaning of the National Insurance Acts? Secondly, if the crier of the court be such a contributor, is the Recorder of Belfast or the county court judge of Antrim in the position of employer in relation to him?

I shall deal with the first question under the insurance legislation as it stood in 1911. Under the statute then in force, it is clear that in order to be "an employed contributor" a person must be under a contract of service or a contract for service, express or implied. The amending Act of 1913 rendered certain other classes of employment insurable; but, in my opinion, that statute could not affect the respondent, as it refers only to employment under "any local or other public authority," and renders it unnecessary to prove any contract of or for service where a person is so employed. In my opinion, this enactment applies only to a "public" body, and, being inapplicable to a recorder of a city or the judge of a county court, cannot affect the decision in this case. The amending Act might, possibly, give ground for an argument that the county council and Corporation of Belfast are liable to contribute under the Insurance Acts; but I have no desire to decide that point, as the parties proper to such decision are not now before the court. In my opinion, it is clear that if there be any liability under the Acts to contribute in respect of the crier of either the Recorder's court or the county court, it is not either the Recorder or the county court judge who is liable to make that contribution.

The facts are fully set out in the case. The crier discharges certain duties of an officer of the court. He is not bound to obey any orders, except so far as such orders affect his duty in court.

When the court is sitting he obeys the orders of the Recorder, as the registrar or clerk of the peace, and, indeed, any other officer of the Court, obeys the orders of those in a superior position. I cannot see that there is any special or particular employment by the respondent save that he, as a judge sitting in his court, employs an officer of that court. When a judge of assize opens the commission, all the officers of the court attend before him, the clerk of the crown, and the crown solicitor. All these obey the judge's orders as those of the head of the court. That does not, however, make them the employees of the judge. They obey as an officer in the army obeys his colonel. In my opinion there is no contract of service proved as between Donaldson and the respondent by the employment of the latter as a crier of the respondent's courts, and I do not think that because he appoints and dismisses the crier the respondent is liable to contribute as employer under the Acts. There is nothing else in the case but the power of appointment and dismissal on which the Recorder could be held liable as an employer.

The authorities bear out my view. Two of the cases cited appear to throw considerable light on the question. The first of these, *In Re National Insurance Act* (1), was the decision of Parker J., that curates of the Church of England, although bound to obey the rector or incumbent, were not persons employed under a contract of service within the meaning of the Act. The position in law of these gentlemen is much the same in my opinion as that of the crier of the court in this case. The employment is not employment under the contract of service. The case was decided prior to the amending Act of 1913. The other case, a much stronger one, was that in reference to the officers of the South Dublin Union, *In re National Insurance Act*, 1911 (*Officers of South Dublin Union*) (2). There the Master of the Rolls held that officers of a workhouse, appointed and dismissed by the guardians, were not employed under a contract of service with the guardians, but discharged the duties of statutory officers. Of course that, too, was a decision before the passing of the amending Act of 1913; but, holding, as I do, that the enactment does not affect this case,

(1) [1912] 2 Ch. 563.

(2) [1913] 1 I. R. 244.

I am of opinion that the officers of the workhouse were in much the same position as the crier of the court here.

The appellants referred to the case of *Fletcher Moore* v. *The Insurance Commissioners* (1). There the question argued was in reference to a teacher in a national school who was employed, and could be dismissed, by the manager of the school, and who was paid her salary by the Commissioners of Education. It was held that the teacher was an insurable person under the Insurance Acts. In that case, however, there was a written contract proved, signed by the teacher and the manager, and the case was on that ground clearly distinguishable from the case now before us. There is no power here for the respondent to prescribe duties for the crier which are outside the common law duties of his office.

For these reasons I am clearly of opinion that the crier is not employed under any contract of service with the Recorder. Whether or not he is "employed under" the county council or the corporation we cannot now decide, as the proper parties are not before the Court. The statute of 1913 applies only to local or other public authorities, and is clearly inapplicable to the Recorder or to a county court judge. If an individual is sought to be made liable for contributions under the Insurance Acts, it must be as an employer under the Act of 1911.

We hold, therefore, that the decision of the resident magistrate was right in law.

Boyd J. concurred.

Solicitor for the appellant: *John Graham.*
Solicitor for respondent: *Hugh Horan.*

C. N. K.

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(1) See *post*, p. 70.

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FLETCHER MOORE *v.* IRISH INSURANCE COMMISSIONERS.

NOTE.

KING'S BENCH DIVISION, 5th 6th, and 7th November, 1913.

Before PALLES C.B. and GIBSON and BOYD JJ.

FLETCHER MOORE, APPELLANT; IRISH INSURANCE COMMISSIONERS, RESPONDENTS.

National Insurance—Assistant Schoolmaster in National School—Employed Contributor—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55).

An assistant teacher in a national school adopted by the Commissioners of National Education who enters into a contract of employment with the manager of the school is an employed contributor within the meaning of the National Insurance Act, 1911; and the manager of the school, notwithstanding that the teacher's salary is paid by the Commissioners of National Education, and not by him, and that the education in the school is controlled by the regulations of these Commissioners, is the employer of the teacher within the meaning of the Act.

CASE STATED under 20 & 21 Vict. c. 43, by the justices of the peace for the county of Wicklow.

The appellant was charged by the respondents in two summonses with (*a*) on the 12th January, 1913, failing to pay eleven contributions of 4½*d.* each under the National Insurance Act, 1911, as the employer of Elizabeth Wickham, an employed contributor within the meaning of that Act; and (*b*) on the 19th April, 1913, failing to pay thirteen contributions of 4½*d.* each under the aforesaid Act in respect of the same employed contributor. Both summonses were heard at Blessington petty sessions on the 26th May, 1913, and the appellant was convicted on both summonses, being ordered to pay the contributions and a fine.

The material portions of the case, as stated by the justices, were as follows:—

"At the hearing of the said summonses it was proved on behalf of the said complainants, by the said Elizabeth Wickham, that she had been appointed by the said defendant as junior assistant mistress of the National School at Manor Kilbride, on the 5th day of November, 1912, under the following agreement:—

"'No. 2. Junior assistant-mistresses, work-mistress, &c. (137). Memorandum of agreement made the 1st day of November, 1912, between Fletcher Moore, D.L., local manager of the Kilbride school (hereinafter called the manager), of the one part, and Elizabeth Wickham, teacher of the said school (hereafter called the teacher), of the other part. (1) The manager agrees to employ the teacher as junior assistant mistress of the Kilbride school, from the first day of November, 1912, henceforth until the expiration of three calendar months from the date at which notice in writing shall have been given by either side to the other to determine the said employment. (2) The manager shall have absolute power to determine the said employment at any time without previous notice to the teacher, but in every such case (not coming under Article III) he shall be bound to pay to the teacher three months' salary recoverable as a debt. (3) The manager shall also have power to determine the said employment without previous notice for misconduct or other sufficient reason, in which case the teacher shall not be entitled to any compensation. (4) In case the teacher shall determine the said employment at any time without giving three calendar months' notice as hereinbefore provided (except for good and sufficient reason) she shall pay to the manager three months' salary recoverable as a debt. (5) The duties of the teacher shall be such as are in accordance with the rules of the Commissioners. (6) The salary and emoluments of the teachers are as follows:—National Board salary and emoluments.

" ' Fletcher Moore, *Manager*,
" ' Elizabeth Wickham, *Teacher*.

" ' Signed in presence of Garret O'Sullivan, Manor Kilbride,
National Teacher.
" ' Authenticated—J. D. Lynam, *Inspector*.
" ' *5th day of April*, 1913.'

" The defendant, who appeared and conducted his case in person, admitted that he had not paid the said contributions, and contended that he was not liable to pay the said contributions on the following grounds, namely:—

" First, that he, the said defendant, was not the employer of the said Elizabeth Wickham within the meaning of the National Insurance Act, 1911. Secondly, that the employment of the said Elizabeth Wickham was not an employment within the meaning of the National Insurance Act, 1911.

" The agreement between the defendant and the said Elizabeth Wickham, dated the 1st day of November, 1912, by which the said Elizabeth Wickham was appointed junior assistant mistress of the school at Kilbride, and the rules and regulations of the Commissioners of National Education in Ireland, the decision of the Irish Insurance Commissioners on question No. 1, raised on application of 5th November, 1912, by Rev. G. B. Sullivan, of Aghadrumsee Rectory, Clones, as to the employment of one Eleanor M. Johnston, a junior assistant mistress, and memorandum from the Commissioners of National Education in Ireland to the managers of national schools, intimating that the Treasury sanction had been obtained for the recouping of school managers for the payments made by the latter of the employers' contributions for the health insurance of the teachers, were given in evidence, and it was given in evidence that the defendant is the owner of the school-house and teachers' residences, and land attached thereto, at Kilbride, and has leased the said house, teachers' residences, and land to the Commissioners of National Education in Ireland, at the rent of one penny per annum, for a term of forty-two years; and it was also proved that the defendant was manager of the said school without any salary or emoluments whatsoever, and held the said post of manager voluntarily in the interests of education.

"Upon the said hearing we, the majority of the said justices, being of opinion that the employment of the said Elizabeth Wickham was an employment within the meaning of the National Insurance Act, 1911, and that the defendant was the employer of the said Elizabeth Wickham within the meaning of the National Insurance Act, 1911, gave judgment against the defendant.

"And hereupon the judgment of the Court is required as to whether we were correct in point of law in our determination as aforesaid, or as to what should be done in the premises."

The following Rules of the Commissioners of National Education in Ireland were referred to in the argument:—

Chapter IV, Rule 40 (*d*): The manager is charged with the direct government of the school, the appointment of the teachers, subject to the approval of the Commissioners, and their removal . . . Rule 49 (*a*): The manager must enter into an agreement with the teacher in one of the forms provided by the Commissioners. [The agreement proved in the case was in the form 2 in Schedule VI to the Rules.]

Chapter VII, Rule 90 (1): Teachers who have declined in efficiency, or who have conducted themselves improperly, are dealt with as the Commissioners determine. Rule 96: Should a teacher have any well-grounded cause of complaint against the manager or the inspector, he may submit his case in writing directly to the Commissioners for their consideration.

Chapter VIII, Rule 106 (*a*): The incomes of teachers consist partly of local payments, but mainly of grants from the Commissioners. (*b*) The local payments comprise subscriptions, donations, and endowments, or school-fees from pupils. In some instances residences are provided rent-free. (*c*) Where school fees are chargeable to the pupils, the rates are fixed by the managers, with the approval of the Commissioners, and cannot be altered except with their sanction (Irish Education Act, 1872, s. 18 (4)). Such fees are payable to the teachers as part of their emoluments, in accordance with the terms of their engagements.

Chapter IX, Rule 119 (*a*): The ordinary school subjects are:—English (including as sub-heads reading and spelling, writing, composition, and grammar), geography, history, arithmetic, singing, drawing, needlework (for girls), physical drill, manual instruction, object lessons, and elementary science, cookery (for girls), laundry-work (for girls), kindergarten (for infants), hygiene and temperance.

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The programmes for instruction may be found in Schedule XVIII (*b*): The managers are at liberty, subject to the recommendations of the inspectors, to adopt for the seventh and eighth standards the programmes issued by the Board of Intermediate Education as far as is indicated in Schedule XVIII, Rule 124 (*a*). No book can be used for the purpose of united secular instruction to which a reasonable objection might be entertained on religious or political grounds. (*b*) The managers may, subject to the foregoing conditions, select the books used in their schools for the purpose of secular instruction, but they are required to submit annually for the examination of the inspector the list of proposed books, not later than one month prior to the commencement of the school year, and they must furnish a copy of any book which does not appear on the list authorised by the Commissioners, or of any new edition of a book already sanctioned. No new book can be used until the official approval has been notified to the manager.

Chapter X, Rule 125: Not less than four hours a day (including intervals as specified at 128 (*c*)) must be provided on the time-table for ordinary secular instruction on at least five days in the week. The time for secular instruction may consist of a single meeting of at least four hours' duration, or of two meetings of at least two hours each, with an interval of not less than one hour between the meetings. The commissioners decide in each case whether two separate meetings in a school-day may be allowed, and, if so, under what conditions.

Chapter VII, Rule 80: The maximum staff of assistants which can be recognized in a school and paid by the commissioners, under existing arrangements with the Treasury, is set forth in the following scale:—Average daily attendance thirty-five, but under fifty: assistants in addition to the principal, one, a junior assistant-mistress. Fifty, but under ninety-five: assistants in addition to the principal, one, a junior assistant-mistress. Rule 82: To warrant the recognition of an assistant teacher in any school, the average attendance must have reached the minimum prescribed in Rule 80 (*a*) for each of the two quarters preceding the quarter in which the appointment is made; or (*b*) for the quarter in which the appointment is made and for the preceding calendar year; or (*c*) for the quarter and for the calendar year in which the appointment is made. Rule 86 (*a*): When an average attendance of fifty is maintained in any school, a fully qualified assistant must be appointed, who in the case of a mixed school must be a mistress.

The recognition of Miss Elizabeth Wickham as assistant teacher was ordered by the commissioners by letter dated the 15th January, 1913, from the commissioners to the appellant.

C. Fforde (with him *FitzGibbon K.C.*)., for the appellant.

The Solicitor-General (*Jonathan Pim K.C.*), and *R. Sheehy*, for the respondents.

FitzGibbon K.C. in reply.

K. B. Div. 1913.

FLETCHER MOORE *v.* IRISH INSURANCE COMMISSIONERS.

PALLES C.B. :—

This is a very interesting case, and has been argued by Mr. FitzGibbon with extreme ability; but when the matter comes to be closely considered, it appears to me to be not arguable at all.

The question is, who is or who are the employer or employers of the assistant-mistress of the school, which is under the National Board? It was first argued by Mr. FitzGibbon that the distinction which obtains under the Employers' Liability Act, with which we are all familiar, namely, that between a contract *of* service and a contract *for* service, obtains here, and that the contract here was one *for* service and not one *of* service. Of course that is an obvious distinction; and in considering the nature of the contract, the Court must have regard to all the circumstances of the case.

Here there is a contract that a young lady should be employed as a junior assistant-mistress, and her entire time during school hours, which include the greater part of the day, should be delegated to her duties; the employment is not casual, but is to extend over the entire of the intervening period, and is to be terminable on three months' notice. In fact it is her occupation in life, and I think that there is no foundation of fact for holding that this contract is not a contract *of* service. It is impossible to distinguish this as a contract *for* service, and I think, in the end, that objection was not pressed; but, whether pressed or not, in my opinion there is nothing in it, and any importance it obtained during the argument was by the skill with which it was presented by Mr. FitzGibbon.

I now come to the substantial question, that is, admitting that this is a contract *of* service, who is the employer? Are the Commissioners of National Education the employers, or is the employer the manager of the school? Now, in the first instance, I should like to remark that the contract of employment was one to which the Commissioners of National Education were wholly strangers. It was made on the 1st November, 1912, and was as follows: "Memorandum of Agreement made the 1st day of November, 1912, between Fletcher Moore, D.L., local manager of the Kilbride School (hereinafter called the manager) of the one part, and Elizabeth Wickham, teacher of the said school (hereinafter called the teacher) of the other part.—1. The manager agrees to employ the teacher as junior assistant-mistress of the Kilbride School from the 1st day of November, 1912, henceforth, until the expiration of three calendar months from the date at which notice in writing shall have been given by either side to the other to determine the employment." Every other provision appears to be a personal one between Mr. Moore of the one part and the young lady of the other, with the single exception of a reference to the National Board Rules. "5. The duties of the teacher shall be such as are in accordance with the rules of the Commissioners."

I fully admit that the mere fact of who is a party to a contract is not conclusive; but it is always one of the most material matters in the consideration of the question we have now to determine.

I should like in the first instance to say a few words upon a matter which was hardly adverted to in the argument, that is the difference between the school as an entity and the Commissioners of National Education. They are as different as anything can be. Mr. Fletcher Moore, the owner of the land, made a lease of it for the school, to be dedicated to the purposes of education under the rules of the patron of the school. He had the right to appoint a manager, and he appointed himself. That in no way identifies the school as the property of the National Board; it is only within modern times that there have been grants of schools to the National Board with a provision that they become owners, and that only in respect of a particular class of schools, i.e., model schools, the distinction between which and the ordinary school is that in their case the National Board appoint one of their officers, an inspector, as manager. Only in that way do the Commissioners come into touch with the school, otherwise they do not act save as a regulating authority. They are empowered, under a charter, to make grants to schools if the rules are complied with, and the general object of these rules is to ensure that the education in the school shall attain to a particular standard. For that purpose limitations are imposed upon the persons allowed to become teachers in the schools; they must have certain qualifications, otherwise they will not be entitled to be paid a salary; but the selection and appointment of the teachers is vested in the manager, and that is the vital distinction between the schools that are adopted and the model schools.

What is the manager of the school? He practically represents the owner of the school, and, subject to rules and regulations, which, as I have said, are for the purpose of securing that the education shall advance to a certain standard, he has the entire management of the school. I do not propose to go through the long code of rules, so ably criticized by the learned Solicitor-General in the course of his able argument. The manager appoints the hours of the school; appoints, subject to certain limitations, the days upon which the school is to be open, and, subject to certain limitations in the higher classes, may prescribe the subjects to be taught. The manager is the *dominus* of the school, subject to the regulations of the Commissioners.

Again—a matter lost sight of in the argument—the school does not necessarily depend on the grant made by the Commissioners, although unfortunately in many cases, as a matter of fact, schools do so depend. It does not at all follow that the manager has no income as manager except the income received from the Commissioners. In the parish in which I live there is a subscription every year to the National Schools, and the subscriptions are from time to time mentioned in the reports laid before Parliament as being in fact provided for the support of these schools.

Then, with reference to this appointment by the manager, the power of dismissal is vested in the manager, subject to qualifications for the purpose of providing proper security for the teacher. No doubt a power of dismissal is vested in the Commissioners; but the object of that is not interference with personal management, but provision that the standard of education shall be kept up to that prescribed by the rules.

Passing from the appointment and dismissal of the teacher to the general management of the school, I hold that the general management of the school is vested in the manager, subject to the over-riding provisions of the Commissioners, which are framed merely with the view that the standard of efficiency should be ensured. The solitary argument that impressed my mind was that the manager, who, it was assumed in the argument, had no income except that derived from the Commissioners of National Education, is, by the Act, made subject to a tax by having to affix the teachers' stamps. In my opinion it is clear that even hardship of that kind, if it existed, could not prevent the operation of the general words of the statute that the employer must pay ; but, at the conclusion of the argument, it appeared that there was nothing in the position of a manager which necessarily brought about such a result as was contended. I have shown that a manager may have, and in many cases has, an income *dehors*, and I can entertain no doubt that the words of the Act of Parliament apply, and that Mr. Fletcher Moore is bound to provide and affix the stamps. It is, however, a convenient thing that the Treasury, who are, I find, very reasonable when a reasonable state of facts is laid before them, have considered, not this particular case, but the case of managers generally, upon the application of the Commissioners, and have come to the conclusion which is now part of the scheme, that the manager is to be reimbursed at the end of the year in respect of the insurance stamps. I cannot but express some wonder, having regard to this, that this case should have been brought; but I do not take that into consideration in construing the Act of Parliament. I do not consider I am at liberty to consider an act of the Treasury in interpreting the statute.

GIBSON J. :—

I concur. There was clearly a contract of service, and the contract manifestly, subject to the National Board rules, was with the manager as employer, with duties of supervision and limited control. The argument that the restrictions imposed by these rules on the manager were inconsistent with the relation of employer and employed is quite untenable. Thus in *Wright* v. *Marquis of Zetland* (1), it was held that a head master employing under-masters was the contracting party, notwithstanding that the head master was bound by the rules of the governing body as to the subjects taught (see p. 64). Nor is the prescribing of forms of contract of employment at all inconsistent with the contract adopted creating the relation of employer and employed. The standard forms are framed to protect both parties.

The objection that the manager, being in a position of trust and without any funds at his disposal, could not be such an employer as the statute contemplated is answered, not merely by the plan and object of the Act, but by the

(1) [1908] 1 K. B. 63.

manager's capacity to retire at will, and by the moral obligation on the Board and Treasury to indemnify, the teachers' stamps being a necessary expense in respect of the education system. The circular issued by the Board undertaking repayment regulates the terms on which the managers continue to hold office; till withdrawn such terms are binding. There is, therefore, no real hardship of which a manager can complain. In any view, however, while he holds office he must fulfil the statutory obligations. The position of the teacher makes risk from non-payment of contribution negligible; and, if the manager objects, he has the remedy in his own hands, he can resign his position. If the manager has available funds, in such case as described by my Lord, all possible difficulty is obviated.

Boyd J. concurred.

Solicitors for the appellant: *Toomey & Barber.*
Solicitor for the respondent: *Hugh Horan.*

C. N. K.

THE CORPORATION OF CORK *v.* THE COMMISSIONER OF VALUATION (1).

K. B. Div.
1914.
Oct. 29.
Nov. 4, 5.
1915.
Jany. 13.
Appeal.
1915.
June 17, 18.
1916.
Jany. 31.

Rates—Poor Rate—Exemption—Hereditaments of a "Public Nature" "Used for Public Purposes"—Hereditaments used for Municipal Purposes—Hall erected and maintained at expense of Borough Fund—Baths and Wash-houses erected under provisions of Baths and Wash-houses Act, 1846 (9 & 10 *Vict. c.* 87)—*Poor Relief* (*Ireland*) *Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*Valuation* (*Ireland*) *Act*, 1852 (15 & 16 *Vict. c.* 63), *s.* 16.—*Valuation* (*Ireland*) *Amendment Act*, 1854 (17 & 18 *Vict. c.* 8), *s.* 2.

Hereditaments used for municipal purposes merely are not hereditaments of a public nature within the meaning of the Valuation (Ireland) Amendment Act, 1854, so as to be exempt from assessment for poor rate.

The Corporation of Cork had erected a hall which was maintained at the expense of the borough fund. The use of the hall was given for public meetings at a nominal charge, and for concerts, &c., for which a charge was made, but no profit was made out of the lettings. The hall was also sometimes used for meetings of the county borough.

The Corporation of Cork had also erected swimming-baths under the provisions of the Baths and Wash-houses Act, 1846. The baths were maintained at the expense of the borough fund, and all receipts from them were paid into the borough fund. The expenditure exceeded the receipts. No member of the public could as of right use the baths, but any member of the public who complied with the bye-laws was permitted to use the baths no matter where he resided.

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(1) In the King's Bench Division before Palles C.B. and Madden and Boyd JJ.

Held, by the Court of Appeal, reversing the decision of the King's Bench Division, that the hall and the baths were not hereditaments of a public nature and used for public purposes so as to be exempt from poor rate.

CASES STATED by the Recorder of Cork, under section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860.

The first case came before the Recorder by way of appeal under section 22 of the General Valuation Act, 1852, against the valuation of £100 placed upon premises the property of the corporation of Cork, known as No. 1 Albert Quay, in the county borough of Cork. The appeal was brought upon the grounds—(1) That the valuation was *ultra vires*; (2) that the premises were exempt from taxation; (3) that even if they were liable to taxation, the valuation was excessive; (4) that the premises were used exclusively for public purposes. The facts proved or admitted were as follows:—

By 3 & 4 Vict. c. 108 provision was made for the creation of a borough fund for the city of Cork, and for the application of that fund, *inter alia*, towards the expense of providing and maintaining corporate buildings in the city. By the Municipal Corporations Act, 1860, power was given to mortgage corporate property with the consent of the Local Government Board for Ireland. In the year 1889 the trustees of the Cornmarket in the borough of Cork, having found themselves in debt, obtained a private Act of Parliament enabling them to transfer their buildings and premises to the Corporation, and empowering the latter to erect municipal offices thereon. Municipal offices were erected on the premises so acquired, but it was found that the new buildings were not adequate to provide for large public meetings, political demonstrations, and gatherings for philanthropic purposes. The Corporation got as a present from the Cork Exhibition Committee an organ. The question of housing that organ having arisen, it was decided in or about the year 1904 to erect a hall so that the organ might be placed therein, and that there might be a place for public meetings, entertainments, &c., in the city. The plan and specification were prepared, and the expense of the works was estimated at £5,500. On February 24th, 1905, the Local Government Board consented to money being raised and applied for the erection of the hall. The expense of the erection of the building was defrayed by money raised by the issue of 3½ per cent. debenture stock of the borough charged upon all corporate property and rates; the interest thereon was paid out of the borough fund, and there was a sinking fund which would in due course extinguish the principal. The total expense of erecting and furnishing the hall was £6,710. The hall was maintained at the expense of the borough fund. The use of the hall was given free of charge for all public meetings of every kind, and a nominal charge of six shillings per meeting was made to cover lighting, heating, and cleansing; but the lighting, heating, and cleansing cost, in respect of each meeting, more than the sum so charged. The use of the building was given not alone for meetings and entertainments of the inhabitants of the borough of Cork, but it was granted for meetings for purposes in connexion with the county of Cork and for other places. It was also used for concerts, bazaars, lectures, and such entertainments, and whenever a charge for admission to such entertainments was made, the corporation charged a sum of £3 for the use of the hall, which sum was intended to cover the actual cost of additional attendance and the cost of lighting and heating. The hall was sometimes used for meetings of the county borough council.

The Recorder was satisfied that the hall was the property of the Corporation, and in their occupation and under their control; that no member of the public could as of right claim to use the hall, and that whenever it was desired to have permission to use the hall an application for such permission was made to the committee of the Corporation which was entrusted with the care of the hall.

For the three years ending March 31st, 1913, the revenue from the letting of the hall was only £200 10*s.* 1*d.*, while the expenditure, including sinking fund and interest, was £1,338 9*s.* 6*d.* It was proved on behalf of the appellants, and not controverted, that the income from the letting out of the hall for meetings, &c., did not disclose a profit, and that even if a profit did accrue, the amount of it would go to the city borough fund.

The contention on behalf of the appellants and the respondent respectively was similar to that in the next case.

In the second case the appeal was against a valuation of £120 placed upon premises the property of the Corporation of Cork, known as the Municipal Swimming Baths, in Eglinton Street, in the county borough of Cork. The grounds of objection were similar to those in the first case. The facts proved or admitted were as follows:—

The Baths and Wash-houses Act, 1846, was on June 23rd, 1899, adopted by the Corporation of Cork; and under the provisions of section 4 the expenses of carrying the Act into execution were made a charge upon, and to be paid out of, the public funds of the borough. Section 15 provided for the auditing of the accounts by the Local Government Board, and section 21 conferred borrowing powers. By section 20 power was given for the making of byelaws, and by section 23 the Corporation were limited to such charges as were authorized by the statute. In 1904 the Corporation decided to provide public baths, and with the sanction of the Local Government Board money was borrowed for the purpose, and the baths were erected at a cost of £6,100; there was expended, in addition, for the heating of the baths £1,728, making a total expenditure of £7,828. Under the provisions of the statute all receipts from the use of the baths had to be paid into the borough fund. The baths were maintained at the expense of that fund. There were two baths of equal size, one of which was absolutely free to those using it. For the other bath a charge of twopence per person was made. The expenditure each year greatly exceeded the receipts from persons using the baths. From 1904 till the end of the financial year 1913, the total receipts amounted only to £1,262 as against an expenditure during that period of £8,071.

It was contended on behalf of the Corporation that there was, in fact, no real income from the baths, as the expenditure so much exceeded the receipts; that the receipts, such as they were, had, in pursuance of the provisions of the statute, to be applied to the borough fund; that the premises were altogether of a public nature, and used exclusively for public purposes; and that, therefore, they were exempt from rating.

It was contended on behalf of the Commissioner of Valuation that the premises were not used exclusively for public purposes, and were not altogether of a public nature, as they were not used for the benefit of the whole community of the taxable area. The taxable area for poor rate in this case was the poor law union of Cork, while the baths were an enterprise of the borough of Cork, which comprised only a portion of the union of Cork. It was urged that to exempt the premises from rating would mean increasing the proportion of the rates which should be borne by the portions of the taxable area outside the borough of Cork. It was pointed out that the receipts from the baths went to the credit of the borough fund, which was a fund peculiar to the borough of Cork, and that the inhabitants of the rest of the taxable area derived no benefit therefrom. It was further contended on behalf of the Commissioner that the baths were rateable for the purpose of poor rate, and for that purpose alone, and, therefore, could not be distinguished as exempt in the valuation list. It was further contended that the destination of the receipts, viz., that they should go to the borough fund, did not operate to render the premises exempt.

The Recorder was satisfied that the user of the baths was regulated by by-laws made by the corporation and duly approved of, and that no member of the public could, as of right, claim to use the baths. He was further satisfied that any member of the public who desired to use the baths, and who complied with the terms of the by-laws, and, in respect of the paying baths, who paid the charge for using the same, would be permitted to use the baths no matter where he resided.

The Recorder held that the premises in each case were altogether of a public nature within the meaning of 15 & 16 Vict. c. 63, s. 16, and 17 & 18 Vict. c. 8, s. 2, and he accordingly allowed the appeals, and ordered the Commissioner to alter and amend his list of valuation by therein and thereby distinguishing the respective premises as being premises of a public nature, and used exclusively for public purposes. On the requisition of the Commissioner of Valuation he stated the present cases, the question in each being, were the hereditaments of a public nature within the meaning of the Valuation Acts, and was the Recorder right in his direction to the Commissioner of Valuation?

J. M. FitzGerald (with him *McElligott K.C.*), for the Commissioner of Valuation :—

Only liability to poor rate is involved in these cases, because the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 168, exempts "any buildings or land belonging to the Commissioners" from municipal rates, and that section is incorporated in the Cork Improvement Act, 1852 (15 & 16 Vict. c. cxliii). By sect. 63 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), buildings or land "dedicated to or used for public purposes" are not rateable "except where any private profit or use shall be directly derived therefrom." The Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), s. 16, prescribes that the premises entitled to exemption shall be "altogether of a public nature," or "exclusively" used for public purposes. The Valuation (Ireland) Act, 1854 (17 & 18 Vict. c. 8), s. 2, provides that the exemption shall last as long as the premises "shall continue to be of a public nature, and occupied for the public service." We submit that municipal purposes are not public purposes within the meaning of this legislation. Moreover, the baths and the city hall are not dedicated to the use of the whole community who reside in the taxable area. The boundaries of the municipal borough of Cork and of the poor law union of Cork are not conterminous; the union area being much larger than the municipal area. These buildings were erected by the Corporation of Cork for the benefit solely of the borough of Cork. The principle of all the cases is that institutions cannot be regarded as being used altogether for public purposes if the benefit from them accrues in favour only of a circumscribed class or locality. The public at large derive no benefit from the premises in these cases. The law in this country in reference to the rating of public buildings is settled by *Guardians of Londonderry Union* v. *Londonderry Bridge Commissioners* (1). There could be no doubt that the bridge there was for the use of the entire public. O'Hagan J. says at pp. 582, 583 :—"Therefore, we have it established that the tolls are not to be employed for any private profit; and that the Commissioners, by whom they are administered, have in them no

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(1) I. R. 2 C. L. 577.

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beneficial interest, and are bound to devote them, and do, in fact, devote them, only to the establishment and maintenance of a work which is a public highway, not for the exclusive advantage of an individual person, a special locality, or a limited class, but for the use of all Her Majesty's subjects." That was the *ratio decidendi* in that case. The *Londonderry Bridge Case* (1) was followed by *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (2), and *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (3). The present cases are governed by the *Mayor of Limerick* v. *Commissioner of Valuation* (4). In that case gas-works owned by the Corporation were held not to be exempt, on the ground that they were carried on for the benefit of a limited class, in a limited locality. The surplus profits in that case were applied in pursuance of the provisions of the special Act in reducing the town improvement rate. It is not necessary in order to bring these premises within the rating provisions that a profit should be actually derived from them. It is sufficient if the property be capable of yielding a clear profit over and above the necessary outgoings: *Mersey Docks* v. *Cameron* (5).

Rearden and *Ronan K.C.*, for the Corporation of Cork:—

The sole question is—are the baths and the city hall used for public purposes? If they are, they are exempt from rating. The benefit from both the baths and city hall is not confined exclusively to the borough of Cork; but, even if it was so limited, the premises would still be of a public character: *Mayor, &c., of Lyme Regis* v. *Henley* (6). It is settled by authority that the meaning of "public purposes" in the Poor Relief (Ireland) Act, 1838, sect. 63, is the meaning we have to determine, and that the subsequent Acts on valuation do not vary it: *Moore* v. *Boyd* (7). In our statutory exemption the vital element is the absence of "private profit or use." The original Act of 1838 "indicates the meaning of public purposes by contrasting exempted premises

(1) I. R. 2 C. L. 577.
(2) [1897] 2 I. R. 516.
(3) [1899] 2 I. R. 214.
(4) I. R. 6 C. L. 420.
(5) 11 H. L. C. 443, at p. 501.
(6) 2 Cl. & F. 331.
(7) [1911] 2 I. R. 579.

from those 'where any private profit or use is directly derived therefrom,' in which case the person deriving such profit or use is made liable to be rated as occupier according to the annual value of such interest or use": *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1), *per* FitzGibbon L.J., at page 223. Decisions on rating given in England before the passing of the Irish Poor Relief Act, 1838, help us in interpreting that statute. It was ultimately decided in the year 1864 in *Mersey Docks* v. *Cameron* (2), that under the English statute of 43 Elizabeth, c. 2, Crown property only was exempted from rating in England, and that simply because the Crown was not mentioned in the statute; but in the year 1838, the law, as expounded by the Courts in England, exempted from rateability property held for public purposes, thus putting other public property on the same footing as Crown property. It was held that trustees who had a bare naked trust not coupled with any beneficial interest, were not liable to be rated; so that if trustees in possession of valuable property were bound to apply the whole of the proceeds therefrom for the benefit of the public, they were entitled to exemption: *The King* v. *The Commissioners of Salter's Load Sluice* (3); *The King* v. *Liverpool* (4); *The King* v. *Beverley* (5); *The King* v. *The Trustees of the Weaver Navigation* (6). In the following cases the English Courts sought to draw a distinction between property occupied for the benefit of the public at large and property occupied only for the benefit of a portion of the public: *The Queen* v. *Badcock* (7); *The Queen* v. *Longwood* (8); *The Queen* v. *Harrogate* (9); *The Governors of the Bristol Poor* v. *Wait* (10); *The Queen* v. *Wallingford Union* (11); but all these cases recognized the main principle laid down by the decisions in the first-mentioned group of cases. In 1839 it was held by the Queen's Bench in England that since the Municipal Corporations Act, 1835, municipal property was held upon trust for the purpose of the borough fund, and that therefore the Corporation of

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(1) [1899] 2 I. R. 214.
(2) 11 H. L. C. 443.
(3) 4 T. R. 730.
(4) 7 B. & C. 61.
(5) 6 A. & E. 645.
(6) 7 B. & C. 70, note.
(7) 6 Q. B. 787.
(8) 13 Q. B. 116.
(9) 15 Q. B. 1012.
(10) 5 A. & E. 1.
(11) 10 A. & E. 259.

Liverpool, being a bare trustee of the property in question for public purposes, was not liable to be rated in respect of the same: *The Queen* v. *The Mayor of Liverpool* (1). In the circumstances it is, we submit, manifest that the framers of the Irish Act of 1838 had in view the principle so generally established by the English tribunals, and that the statute was so drawn as to give statutable effect to it in this country. There is a distinction between the law in England and in Ireland at present. In England only Crown property, properly so called, is exempt from rating. Upon the same ground, namely, that the Crown is not mentioned in the statute, governmental property is exempt in Ireland; but in addition the Poor Relief (Ireland) Act, 1838, exempts properties dedicated to or used for "public purposes," except where any "private profit or use shall be directly derived therefrom." It is obvious that "public purposes" in our code includes more than Crown purposes, and our submission is that municipal purposes are public purposes within the meaning of the Act of 1838 and the Valuation Acts. The baths in Cork were erected under a public statute out of public money, and so also was the city hall, which is part of the municipal premises, and any profit out of these undertakings must be paid over to the borough fund for the benefit of the public. The present cases are clearly governed by the *Pembroke Urban Council* v. *Commissioner of Valuation* (2); see particularly the judgment of Lord O'Brien L.C.J. at pages 436, 437, which judgment was followed and adopted by Madden J. in *University College, Cork* v. *Commissioner of Valuation* (3) at page 618; and by Barry L.C. in the Court of Appeal (4). There is no similarity between the present cases and the *Limerick Case* (5), because in the latter the decision went on the ground that the corporation was engaged in municipal trading.

[They also referred to *Clancy* v. *The Commissioner of Valuation* (6); *Income Tax Commissioners* v. *Pemsel* (7); *London County*

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(1) 9 A. & E. 435.
(2) [1904] 2 I. R. 429.
(3) [1911] 2 I. R. 593.
(4) [1912] 2 I. R., at p. 338.
(5) I. R. 6 C. L. 420.
(6) [1911] 2 I. R. 173.
(7) [1891] A. C. 552.

K. B. Div. 1914.

Corporation of Cork v. Commissioner of Valuation.

Council v. *Churchwardens of Erith* (1); *O'Neill* v. *The Commissioner of Valuation* (2); the Municipal Corporations (Ireland) Act, 1840 (3 & 4 Vict. c. 8), ss. 128, 131.]

M'Elligott K.C., in reply:—

The Cork Cornmarket Act, 1889 (52 & 53 Vict. c. xxxvii), authorized the transfer to the Corporation of all the lands, buildings, and premises then vested in the Cornmarket trustees, and by sect. 15 empowered the corporation to adapt the market buildings for municipal buildings and offices; but the market and the convenience of persons resorting thereto were not to be interfered with. The city hall is not even a purely municipal building; the meetings of the Borough Council are not usually held there; in fact the place is, generally speaking, used for purposes which are not municipal. It is used almost entirely for private, as distinguished from public purposes. In order to bring premises within the exemption in the Valuation Acts there must be an exclusive user for public purposes. A substantial user for any other purpose deprives the premises of the benefit of the exemption. In all the cases decided in favour of exemption, the universal or national character of the undertakings in question has been taken into account. It is true that at one time there was a disposition in the English courts to hold that municipal purposes were public purposes, but nearly all the decisions cited by the other side were based on a misconception of the law, and they were all over-ruled by *The Mersey Docks* v. *Cameron* (3).

Cur. adv. vult.

1915. Jan. 13.

Palles C.B.:—

The main question for determination here is whether "municipal purposes" are "public purposes" within the meaning of the Act, 17 & 18 Vict. c. 8, sect. 2, so as to render hereditaments used exclusively for such purposes exempt from rating under the Poor Relief Acts.

It is passing strange that so general a question on a statute passed upwards of sixty years ago should come up for decision now. Yet we are told by the learned counsel for the Commissioner of Valuation that, in reference to hereditaments typically used for such purposes, viz., town-halls, a different practice prevails in different cities; the town-hall in Cork not being rated, whilst those in Dublin and Belfast are. I trust that, whatever else may be the result of this case, it may introduce uniformity in respect of rating of such buildings.

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(1) [1893] A. C. 562.

(2) [1914] 2 I. R. 447.

(3) 11 H. L. C. 443.

It is quite settled that this section of the Act, 17 & 18 Vict. c. 8, is to be construed with the 1 & 2 Vict. c. 56, s. 63, and that the word "public" has the same meaning in each. This Act of 1 & 2 Vict. c. 56, was the statute by which rates for the relief of the poor were first introduced into Ireland. By its 15th section it authorized the Poor Law Commissioners by order to unite such and so many townlands as they might think fit to be a poor law union, and by subsequent sections the guardians of each union are empowered to levy rates upon the rateable hereditaments within the union; so that the Act authorized not one uniform rate for the entire of Ireland, but separate rates for each union, or part of a union. As the percentages at which those rates are fixed by the guardians may and do vary according to the circumstances of the locality, it is clear that the percentage of the rate on a particular townland may in part depend upon the accident of the union in which it is situate.

The 63rd section defines rateable hereditaments, and provides exemption from rateability for buildings used for certain defined charitable purposes, or for "any building, land, or hereditaments dedicated to or used for public purposes," except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated as an occupier according to the annual value of such profit or use.

By the Valuation Acts of 1852 and 1854 certain slight alterations have been made in the description of the exempted hereditaments, which under section 2 of the latter Act are "hereditaments or tenements of a public nature, ... and occupied for the public service," with a proviso—immaterial for the purposes of the present case—in reference to half the rent derived by the owner, or other person interested in any such hereditament. The distinction here drawn is between that which is public and that which is non-public or private, and the question is the sense in which the word "public" is used in 17 & 18 Vict. c. 8, s. 2. Speaking generally, that word may be used, in reference to property in any of three senses:—

1. As that which belongs to the Crown as the government of the country. 2. As that in which each member of the public has an interest, as, for instance, a public road; and 3. As that in which each member of a limited and defined class of the public has an interest as, *e.g.*, the ratepayers of a particular union, barony, county, or city.

Shortly after the passing of the Act last referred to, 17 & 18 Vict. c. 8, the question arose whether the words "and occupied for the public service" did not show that the word "public" in the 17 & 18 Vict. c. 8, sect. 2, and consequently in the 63rd section of the Act of 1838, was used in the first of the senses I have mentioned; and in the *Londonderry Bridge Case* (1), that question was answered in the negative. The hereditament, the subject of that case, was a bridge open to all the subjects of the Crown, and not to a limited section of the public, and it was not necessary to determine, nor was it determined, whether the true meaning of the word "public" was the second or third of those I have mentioned. The decision did no more than exclude the first meaning, and hold that a hereditament in which each member of the public at large had an interest was within the exemption.

Before coming to the argument mainly relied on, as the context in which a word is used is usually of much importance in determining its meaning, I may remark that, in the statutes here, "public" is used in reference to matters essentially local in their nature, in reference to local rates. In regard to local rates, the use of some hereditaments is private—that is of particular ratepayers—whilst that of other hereditaments is that of several ratepayers. If these several persons amount to *all*, as distinguished from *one* or *some* of those ratepayers, in my opinion the antithesis between private and public would be perfect, and the user would properly be described as for a "public purpose," and the hereditament itself as of a "public nature." Had the boundaries of the poor law union and of the municipal borough of Cork been identical, I should have been of opinion that both the hereditaments here were of a "public nature" within the meaning of these statutes. I should have been of this opinion even without the expressions of Park J., in stating the opinion of the judges in *Mayor, etc., of Lyme Regis* v. *Henley* (1), relied on by Mr. Ronan in his argument, in which case the question was whether an obligation in a charter that the grantees should repair and maintain the seashore within a borough concerned the public to such an extent as to make a breach of it a fit matter for indictment. As to it Park J. said (p. 352): "It is said that the repair of a highway or a bridge is matter of public concern because all the King's subjects may have occasion to use it. And why may not all the King's subjects have occasion to reside in or to pass through the borough of Lyme? It may be difficult to define precisely over what quantity of land or to how large a district any benefit must be extended in order to render such benefit a matter of general and public concern, but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extended to a whole town or borough."

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(1) I. R. 2 C. L. 577.

Here the matter relied on is that the borough of Cork and the poor law union of Cork are not exactly co-extensive; but if the question here were in relation to a borough rate, the use being one in which all the ratepayers of the borough are interested, it is hard to see how the word "public" in section 2 of the statute of 1854 should not be held applicable, in order, if for no other reason, to exempt the corporation from being assessed to the borough rate, and thus going through the useless and round-about process of paying a rate the amount of which, when received, should return to and form part of the same fund out of which it had necessarily and legally been paid.

Mr. Ronan, in the course of his able argument, urged an additional ground, viz., that the object of the 1 & 2 Vict. c. 56 was to impose upon Ireland a tax for the relief of the poor with the same incidents and liabilities as that which has existed in England from the time of Queen Elizabeth, and he alleged that at the time of the passing of the Irish Act it was settled by a long train of decisions in England that in a case such as the present the hereditament in question would have been exempt, and that therefore it ought to be held exempt now. Had I been satisfied that the second of these propositions was true, and that in 1838 the settled law was that a hereditament held for purposes in which the public in a limited defined locality had an interest was exempt on the ground that it was held for public purposes, I should have hesitated much before I rejected the argument. Indeed I probably should have yielded to it. On a careful consideration, however, of the English cases, having special regard to the dates of the decisions, I found that at the time of the passing of the 1 & 2 Vict. c. 56 the law was not so settled, but on the contrary was in a most confused and unsettled condition, the greater number of the cases relied on by Mr. Ronan having been decided after the passing of the Irish statute.

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(1) 2 Cl. & F. 331.

The three decisions next before the 31st July, 1838, the date of the passing of the Irish Act, were the *King* v. *The Inhabitants of Liverpool* (1); the *King* v. *The Trustees of the River Weaver Navigation Company* (2); and the *Governors of the Bristol Poor* v. *Wait* (3), the latter of which was decided in May, 1836.

In *The King* v. *The Inhabitants of Liverpool* (1) the question was whether a dock company was rateable in respect of certain docks or of the dock rates received by them. The Act of Parliament under which the docks were built provided that the dock rates should be applied to paying off the debt incurred in making the docks, and in keeping them in repair, and that then the rates should be lowered, reserving sufficient for these purposes, and it was held that they were not rateable. Lord Tenterden there said: "As to the main question, the case of *Rex* v. *The Commissioners of Salter's Load Sluice* (4) is decisive .... The statute directs that certain burthens shall be discharged, and that then the rates shall be lowered; and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute. The principle of not rating property in which no person has a beneficial occupation is not confined to canals or docks or property of that nature. A Quakers' meeting-house, if the pews are not let, is not rateable, as was decided in *Rex* v. *Woodward* (1), and the same would be applicable to a chapel with the rites of the Church of England, or to a Dissenting meeting-house. On the other hand, it was held in *Rex* v. *Agar* (2) that where the pews of such a meeting-house were let, the trustees were rateable in respect of the rents, although not received for their own use but for the use of the minister." I treat this case as in Mr. Ronan's favour, as if the surplus tolls were to be applied for the benefit of Liverpool.

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(1) 7 B. & C. 61.
(2) 7 B. & C. 70 (note).
(3) 5 A. & E. 1.
(4) 4 T. R. 430.

The King v. *The Trustees of the River Weaver Navigation* (3) had been previously argued, and judgment had been deferred until the *Liverpool Case* (4) had been decided. The surplus tolls of that navigation were directed by statute to be expended in re-paving public bridges and highways. Bayly J., in delivering judgment after the decision in *The King* v. *Liverpool* (4), decided that as those were public purposes, and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees. I treat this case also as a decision in Mr. Ronan's favour.

Before, however, the decision of the third of these cases, *Governors of the Bristol Poor* v. *Wait* (5), Lord Denman had become Chief Justice of the King's Bench. It was an action of replevin. The plaintiffs, the Governors of the Poor of Bristol, had hired a house *without their district* solely for the purpose of setting their own paupers to work there. It was there held by a Court consisting of Lord Denman, and Littledale, Williams, and Coleridge JJ., that the house was rateable whether the employment of the paupers there was profitable or not.

That case was decided, as were all the English cases of that time, upon the question whether the occupation was or was not beneficial. It is to be observed that in this case neither *The Salter's Load Sluice Case* (1), nor *The King* v. *Liverpool* (2), nor *The King* v. *Trustees of Weaver Navigation* (3) was cited, although *Rex* v. *Occupiers of Saint Luke's Hospital* (4), the case upon which *The Salter's Load Sluice Case* (1) was founded, and the statement of Lord Mansfield, which was the origin of the long line of erroneous decisions which was set right in *The Mersey Docks* v. *Cameron* (5), were mentioned not only by counsel, but in the judgment of the Court delivered by Lord Denman.

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(1) 5 T. R. 79.

(2) 14 East. 256.

(3) 7 B. & C. 70 (note).

(4) 7 B. & C. 61.

(5) 5 A. & E. 1.

This case was followed in cases decided after the Act of 1838, such as *The Queen* v. *Badcock* (6), *The Queen* v. *Longwood* (7), and *The Queen* v. *Harrogate* (8), and was the origin of a line of cases inconsistent with *The King* v. *Liverpool* (2), which finally succeeded in the House of Lords in showing that the last-mentioned case was wrongly decided. It is thus spoken of by Mr. Justice Blackburn in stating the opinion of the majority of the judges in the *Mersey Docks Case* (5):—"The decision in *The Governors of the Bristol Poor* v. *Wait* (9) has been repeatedly acted upon, and never questioned that we know of. As the decision in that case and those which followed it were decisions in favour of the rates, and consequently might have been questioned in replevin, the acquiescence in them does add something to their authority."

For these reasons I am unable to hold that at the time of the passing of the 1 & 2 Vict. c. 56, it was the settled course of decisions in England that hereditaments held for the purposes of a limited class of the public, i.e., of the public within a defined area, were exempt from taxation by reason of being held for public purposes.

In a more limited sense, however, some assistance may be gained from the subsequent case of *The Queen* v. *The Mayor of Liverpool* (10). The 5 & 6 Wm. 4, c. 76, the English Municipal Corporations Act, had compelled the corporation to pay the surplus of the dock rates into the borough fund, and for this reason the

(1) 4 T. R. 730.
(2) 7 B. & C. 61.
(3) 7 B. & C. 70 (note).
(4) 2 Burr. 1053.
(5) 11 H. L. C. 443.
(6) 6 Q. B. 787.
(7) 13 Q. B. 116.
(8) 15 Q. B. 1012.
(9) 5 A. & E. 1.
(10) 9 A. & E. 435.

Queen's Bench in England held in 1839 that the effect of this enactment was to render the corporation no longer liable to be rated in respect of property occupied by them, and the statute 4 & 5 Vict. c. 48, recognizes that decision as correct.

I admit that, in consequence of the decision in the House of Lords in *The Mersey Docks Case* (1), notwithstanding that statute the case of *The Queen* v. *The Mayor of Liverpool* (2) can no longer be considered an authority, so far as it decides that such a corporation is in England exempt from rates, but it is still law so far as it decides that since our Municipal Corporations Act (3 & 4 Vict. c. 108) corporate property, in this country, is held for public purposes, and that, too, in reference to rating. As I have already said, were the question before us the liability of the corporation to be rated to a borough rate, I should have been prepared to hold that the hereditaments were of a public nature within the 17 & 18 Vict. c. 8, s. 2.

This brings me to consider the effect of this upon the right to be distinguished under the last-mentioned statute, which would involve immunity from poor rate as well as from borough rate.

Under 3 & 4 Vict. c. 108, s. 133, borough rate is to be assessed, levied, and raised, from and off the owners and occupiers, or tenants of all hereditaments rateable for the relief of the destitute poor in Ireland. The hereditaments rateable to poor rate and borough rate being thus identical, the Valuation Act of 1852, as amended under our Local Government Act by its 27th section, directs that every poor rate, and every rate made by any town council within the county or urban district, shall be made upon the hereditaments liable thereto (which I have shown are identical) according to the valuation in the lists of valuation, and it is in these lists that the Commissioner is to distinguish the hereditaments of a public nature. This public nature was, therefore, to affect rateability to both poor rate and borough rate, and, under 3 & 4 Vict. c. 108, s. 133, the hereditaments made rateable to borough rate should be identical with those made rateable to poor rate, for which reason, as well as from the entire structure of the Valuation Acts, 1852 and 1854, if hereditaments were of such a public nature as to be exempt from borough rate, they necessarily should be of such a public nature as to be exempt from poor rate. An exemption from borough rate of a hereditament remaining rateable to poor rate was neither contemplated nor possible. The only exemption was one from both rates, and this was to depend upon one single point, dedication to a "public" purpose. The purpose which was "public," so as to exempt from borough rate, was, in my opinion, "public" so as to exempt from poor rate.

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(1) 11 H. L. C. 443.

(2) 9 A. & E. 435.

I am, therefore, of opinion that all the hereditaments, the subjects of the two appeals, ought to have been distinguished by the Commissioner, and that the decision of the Recorder was correct.

Were this otherwise, I should be of opinion that the public baths and wash-houses ought to have been distinguished on another ground, viz., that they were for purposes of all the public generally, and not for the purposes of the ratepayers of the borough of Cork only. Having regard, however, to my opinion on the other questions, I think it unnecessary to elaborate the latter ground.

Both appeals should, in my opinion, be dismissed with costs.

MADDEN J.:—

I concur, and for the reasons stated.

BOYD J.:—

The only difficulty I had in the case was the express wording of the Cork Cornmarket Act, 1889 (52 & 53 Vict. c. xxxvii), s. 15. That section expressly enacts that the corporation may adapt the buildings, formerly belonging to the Cornmarket trustees, for the purposes of municipal offices, provided that due accommodation was left for the market and for the convenience of persons resorting thereto. One could hardly say that the building of this city hall was within the contemplation of that section, but as that matter does not arise in this case, I concur in the judgment which has been delivered by the Lord Chief Baron.

C. L.

The Commissioner of Valuation appealed (1).

Carrigan K.C., and *M'Elligott K.C.* (with them *J. FitzGerald*), for the Commissioner of Valuation :—

We submit that both sets of premises are liable to poor rate. The Lord Chief Baron has based his decision on the ground that because these premises are exempt from borough rate, they are also exempt from poor rate, since both rates are to be made according to the valuation in the lists of valuation, and it is in these lists that the Commissioner is to distinguish hereditaments of a public nature. He says that an exemption from borough rate of a hereditament remaining rateable to poor rate, was neither contemplated nor possible. But in fact it had been contemplated, for sect. 168 of the Towns Improvement Act, 1847, provides that hereditaments and lands belonging to the Commissioners are exempt from borough rate. That section would have been unnecessary if the view of the Chief Baron is correct. We submit that when hereditaments are used for municipal purposes only, they should not be distinguished in the valuation lists, but that it is for the town clerk, when dealing with the borough rate, to apply the exemption. The poor law union in the present case is more extensive than the borough of Cork, and the effect of exempting these premises would be to throw an additional poor rate on the persons outside the borough.

We contend that the premises in question are not of a public nature, or used for public purposes, within the meaning of the Valuation Acts. The Lord Chief Baron states that the word "public" may be used in reference to property in any of three senses, the third being "that in which each member of a limited and defined class of the public has an interest, *e.g.* the ratepayers of a particular union, barony, county, or city." We submit that the word "public" in the Valuation Acts does not bear this meaning, and that hereditaments used for municipal purposes merely are not exempt from poor rate, and that this is so quite apart from the question whether or not any profit is derived from them.

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(1) In the Court of Appeal before SIR IGNATIUS J. O'BRIEN L.C., CHERRY L.C.J., and MOLONY L.J.

Appeal.
1916.

CORPORATION OF CORK v. COMMISSIONER OF VALUATION.

The *Mersey Docks Case* (1) decided that under the English Act, 43 Eliz. c. 2, the exemption from poor rate applied only to Crown property. *The Londonderry Bridge Case* (2) shows that the category of public property in Ireland is wider than in England, and it was held that the bridge in that case was exempt. But the ground of the decision was, that it was a public highway open to all the Queen's subjects. That case was followed by the case of *The Mayor of Limerick* v. *The Commissioner of Valuation* (3), in which it was held that the Limerick Gas Works were not exempt from poor rate, although the surplus profits were to be applied for the benefit of the ratepayers of Limerick. The Chief Baron refers to *The Queen* v. *The Mayor of Liverpool* (4), where it was held that because the surplus profits were to be applied for the benefit of the borough, the premises were not rateable; and he says that the statute 4 & 5 Vict. c. 48 recognizes this decision as correct. In the *Limerick Case* (3), however, Whiteside C.J. states that the Act is not declaratory. From the observations of Blackburn J. in the *Mersey Docks Case* (1) (p. 472), it is evident that he did not approve of the decision in *The Queen* v. *Mayor of Liverpool* (4). In the *Belfast Harbour Case* (5) Gibson J. says that the *Londonderry Bridge Case* (2), "as explained and followed in the *Limerick Case* (4) decides two points—First, that public purposes extend beyond governmental purposes . . . Second, that such purposes mean purposes in which all members of the community are interested, and not purposes for the benefit of individuals, a class, or a locality." In *R.* v. *Badcock* (6), Lord Denman discusses the meaning of the word "public," and points out that the cases in which premises were held exempt from poor rate were those in which the public, as such, unlimited by the bounds of county, borough, or parish, had a substantial and direct interest in the benefit which the application of the funds produced, as distinct from cases where the ratepayers or the inhabitants of certain parishes were alone concerned in the benefit.

The hall here is a building used for municipal purposes. These

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(1) 11 H. L. C. 443.
(2) I. R. 2 C. L. 577.
(3) I. R. 6 C. L. 420.
(4) 9 A. & E. 435.
(5) [1897] 2 I. R. 516.
(6) 6 Q. B. 787.

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are the only purposes for which it could have been built under the provisions of the Cork Corn Market Act, 1889, s. 15. No person outside the borough could claim as of right any benefit in respect of these premises.

The baths were built as a purely municipal undertaking under the provisions of the Baths and Wash-houses Act, 1846. By s. 4 of that Act the income arising from the baths is to be paid into the borough fund. The facts are very similar to those in *The Queen* v. *Harrogate Commissioners* (1).

[They also referred to *O'Neill* v. *Commissioner of Valuation*; *Council of Alexandra College and School* v. *Same* (2); *Clancy* v. *Commissioner of Valuation* (3); *Pembroke Urban District Council* v. *Commissioner of Valuation* (4).]

Serjeant Sullivan K.C. (with him *Rearden*), for the Corporation of Cork :—

Section 63 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), provides that no building, land, or hereditament dedicated to or used for public purposes shall be rateable, except where any private profit or use shall be derived therefrom, thus showing that a public purpose is one distinguished from a private profit. The *Londonderry Bridge Case* (5) merely decided that the bridge there was exempt; it did not decide that premises used for the benefit of a municipality would not be exempt. O'Hagan J. (p. 585) takes the distinction between the public benefit of the community and the private or exclusive use of a member of it. In *Mayor of Lyme Regis* v. *Henley* (6) it was held that the keeping up the sea defences of a town or borough was a matter of public general concern. Park J., who delivered the opinion of the judges, says (p. 352):—"It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extended to a whole town or borough."

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(1) 15 Q. B. 1012.
(2) [1914] 2 I. R. 447.
(3) [1911] 2 I. R. 173.
(4) [1904] 2 I. R. 429.
(5) I. R. 2 C. L. 577.
(6) 2 Cl. & F. 331.

The present cases are quite distinct from cases such as *Mayor of Limerick* v. *Commissioner of Valuation* (1), where the undertaking is worked as a mere trading concern.

The hall here cannot be legally used except for public purposes, and it is immaterial that a charge is made for meetings, concerts, &c. The baths have been erected by the Corporation in performance of their duty as sanitary authority to look after the public health.

We submit that the ground taken by the Lord Chief Baron in his judgment is conclusive, viz., that the borough rate and the poor rate are struck on the same valuation lists, and as it is on these lists that the Commissioner is to distinguish hereditaments of a public nature, the public nature which will exempt from borough rate must also exempt from poor rate. Section 168 of the Towns Improvement Clauses Act, 1847, deals only with exemption of persons, not of hereditaments.

[He also referred to: *Pembroke Urban District Council* v. *Commissoner of Valuation* (2); *Horner* v. *Lewis* (3).]

Carrigan K.C., in reply.

Cur. adv. vult.

1916.
Jan. 31.

SIR IGNATIUS J. O'BRIEN L.C.:—

These cases were argued before us so far back as the month of June last year. The delay in giving judgment arose largely from the fact that it was obvious that the question to be determined was one of the greatest public importance, and as this court is the ultimate court of appeal in a proceeding such as was taken here, it was necessary to give the most minute consideration to the arguments which have been advanced on both sides, and above all to the judgment of the Lord Chief Baron, acquiesced in by the other two judges, in the King's Bench Division.

It is unfortunate that our decision must, in a proceeding such as the present, be final, because the cases which have arisen in connexion with the question of exemption from valuation in Ireland are of such vast public importance that anyone, no matter how clear he might be as to the correctness of his judgment, would more than welcome the possibility of its consideration, and, if necessary, correction, by the highest appellate tribunal.

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(1) I. R. 6 C. L. 420.
(2) [1904] 2 I. R. 429.
(3) 67 L. J. K. B. 524.

The question, as I have said, is of the greatest public importance, and some of the delay which has taken place, and for this I have to apologize, has been due to inquiries which I thought it desirable to make with regard to the actual position in moneys numbered of property of a civic character in this country which might be affected by our decision. Moreover, before arriving at a conclusion which differs from that arrived at by the Lord Chief Baron, I felt it desirable that I should proceed with more than ordinary caution. The experience which the Lord Chief Baron has had in administering the law with regard to these matters of rating in Ireland is great and unique, and a judgment of his on any question connected with the subject must carry the utmost weight, and, if it is to be overruled, must only be overruled after the fullest consideration of all the authorities which can throw any light on the question in issue.

I agree with the observation made in the course of argument, that, no matter how inconvenient the result of a decision may prove, effect must be given to the law; and, indeed, in one of the earlier rating cases in England this view may be found: *The Queen* v. *The Mayor of Liverpool* (1). At the same time, I do not think that, especially in modern times, it is at all beside the issue to bear in mind the actual facts, affecting, as they may, large classes of the community; and if the result of a decision would *prima facie* appear startling, having regard to these facts, the consideration of the law ought to be approached with greater caution than under circumstances where a similar result would not ensue.

I agree with an observation of the Lord Chief Baron that he trusts "that whatever else may be the result of this case, it may introduce uniformity in respect of rating of buildings used for municipal purposes." It is quite possible that cases will arise in the future with respect to some classes of municipal buildings

(1) 9 A. & E. 435, at p. 441.

which will not be absolulely governed by the present case; but I am glad to think that the decision at which I have arrived, and which I think is concurred in by my colleagues, will greatly simplify the situation in future with regard to a great deal of property which may be described in general terms as municipal, having at the present time a considerable value, and which one may hope in the future, with greater prosperity in the country, may still further increase in value.

In the present proceedings two cases were stated by the learned Recorder of Cork for the consideration of the King's Bench Division: one as to a certain concert hall, or assembly hall, in the city of Cork, which forms part of the municipal property; and the other with regard to certain baths which were erected for the benefit of the municipality of Cork, under the provisions of the Baths and Wash-houses Act, 1846. The Corporation of Cork claim that this hall should be exempt from poor rate, and, of course, from any rate struck within the limited area of the city of Cork for local purposes. On the other hand, it was contended on the part of the Commissioner of Valuation that these building swere not, having regard to the true intent and meaning of the Valuation Acts in Ireland, exclusively used for public purposes, and were not exempt from poor rate.

Counsel for the appellants dealt with the appeal in two phases. Statistics were given by the Corporation to show that no profits were made either from the baths or from the hall, and that, therefore, quite apart from any larger question, they might possibly be exempt from poor rate on this ground; and counsel for the appellants questioned the accuracy of these statistics. But another and larger ground was also taken, and Mr. Carrigan, in an argument of great weight and erudition, has satisfied me that the question must be approached and decided on much broader principles, if we are to have anything like uniformity with respect to rating of hereditaments used for purely municipal purposes. Accordingly, I do not intend in any way to deal with that narrow question, depending on the consideration of possible profits.

I wish to refer to a few of the findings of fact which the learned Recorder has placed before the court for consideration.

By 3 & 4 Vict. c. 108, the Municipal Corporations (Ireland)

Act, 1840, provision is made for the creation of a borough fund for the city of Cork, and for the application of this fund, *inter alia*, towards the expense of providing and maintaining corporate buildings in that city. At the time of the passing of that Act the question of municipal rates was a comparatively simple matter; but now it has become more complicated owing to the provisions of the Public Health Acts and the Local Government Act. But this fundamental condition remains, that whether the moneys derived from buildings such as these are paid into the borough fund directly under 3 & 4 Vict. c. 108, or whether these buildings are erected and maintained under other statutes, the buildings are, at any rate primarily, established for the local benefit of the inhabitants of these large cities, namely, Dublin, Cork, and Belfast.

It is also found by the cases that the municipal area of the city of Cork does not correspond with the poor law area, which latter comprises, as well as the city, part of the county adjoining.

A similar condition of things unquestionably exists, if anything in a more complicated form, in connexion with Dublin and Belfast, and probably in connexion with every municipal town in Ireland which is under the provisions of the Towns Improvement Act, or a special statute creating it an independent urban area.

In the year 1889, the trustees of the Cornmarket in Cork found themselves in debt, and by the provisions of the Cork Cornmarket Act, 1889, the buildings and premises of the trustees were transferred to the Corporation, and power was given to make municipal offices thereon. Municipal offices were erected on the premises; and on a portion of the ground transferred by the trustees a large hall was also erected, which unquestionably is a most creditable establishment and of great advantage to the inhabitants of the city of Cork. The Recorder finds that the use of the hall was given free of charge for all public meetings of every kind; and for such meetings no charge was made except a nominal charge of 6*s*. per meeting to cover lighting, heating, and cleansing of the hall; and he states that he was satisfied that the lighting, heating, and cleansing of the hall cost in respect of each meeting more than the sum so charged.

The hall was also used for concerts, bazaars, lectures, and such entertainments, and a charge for admission to such entertainments was made. The corporation charge £3 for the use of the hall, to cover the actual cost of additional entertainments, and the cost of lighting and heating the hall. The hall is also sometimes used for meetings of the county borough council. The Recorder states that he was satisfied that the income from the letting out of the hall for meetings, &c., did not disclose a profit, and that even if a profit did accrue, it would go to the city borough fund.

Then comes the material part of the finding. The Recorder states that he was satisfied that "No member of the public could as of right claim to use the hall, and that whenever it was desired to use the hall an application for such permission was made to the committee of the appellants (the Corporation) which was entrusted with the care of the said hall."

As I have said, I do not concern myself with this small matter of charges, because, as I understand the judicial decisions, the mere fact that a profit was made or a loss sustained cannot affect the ultimate question, which must depend on whether or not the premises are occupied exclusively for public purposes within the meaning of the Valuation Acts.

The important point is that under the Cork local statutes these premises were erected as part of the municipal undertaking of the city of Cork, and that no person outside the municipal area could *as of right* demand the user of the hall for any purpose. With regard to the inhabitants of the city of Cork itself, there is of course vested in the Corporation the right to regulate the user of the hall, but, so far as the general community of the city of Cork is concerned, the hall could not be withdrawn from the category of municipal buildings which form part of the corporate property to be used for the benefit of the community of the city of Cork. On the other hand, however, it would be perfectly legitimate to refuse the right of user of the hall to the inhabitants of the adjoining district.

I lay stress on this because it goes to the root of the view which I take as regards these municipal buildings.

The Recorder proceeds: "I was satisfied that the use of the building was given not alone for meetings and entertainments of the inhabitants of the county borough of Cork, but that it was granted by the appellants for meetings for purposes in connexion with the county of Cork and for other places." That, however, is merely *ex gratia*, and I conceive that the principle as to the exemption of premises on the ground of the public at large having rights in them does not apply where the user by the greater part of His Majesty's subjects is a matter of mere grace and licence on the part of those who are the owners of the buildings for local municipal purposes.

So much for the hall. The case of the baths presents at first sight some slight superficial differences, as the right of user is even more restricted than in the case of the hall. The baths were established under the Baths and Wash-houses Act, 1846 (9 & 10 Vict. c. 87). The Act recites that it is desirable for the health, comfort, and welfare of the inhabitants of cities and towns in Ireland to encourage the establishment therein of public baths and wash-houses, and public open bathing-places; and enacts that it may be adopted for any incorporated borough in Ireland which is regulated under 3 & 4 Vict. c. 108, or any city or town in which commissioners are elected under 9 & 10 Geo. 4, c. 82. It provides, by sect. 3, that the council of a borough or commissioners of a city or town may adopt the Act *for such borough or town*; but when they adopt it, it is manifest that it would not be open to them to build baths and wash-houses for the general use of those who lived in an extra-municipal area, or to give these persons any rights as such in the baths and wash-houses. The trust under which the baths and wash-houses come into existence is contained in the statement in the statute that they are intended to be for the health, comfort, and welfare of the inhabitants of the cities and towns which adopt the Act.

The learned Recorder was fully aware of this provision when he stated the very clear and satisfactory case we have to deal with here. He states that under the provisions of the statute all receipts from the use of the baths must be paid into the borough fund. He says: "I was satisfied that the baths were the property of the appellants, and in their occupation, and under their control; that the user of them was regulated by bye-laws made by the appellants and duly approved of, and that no member of the

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public could as of right claim to use the baths. I was further satisfied that any member of the public who desired to use said baths, and who complied with the terms of the bye-laws, and, in respect of the paying bath, also paid the charge for using the same, would be permitted to use the baths no matter where he resided."

I need not recapitulate what I have already said as to the position of the inhabitants of the extra-municipal area with regard to the hall. As in that case, so here, there is only a permissive user by anyone. It is a permissive user absolutely, so far as those who are not inhabitants of the city of Cork are concerned, because they could be prohibited, I conceive, by suitable bye-laws from using the baths at all, and because the corporation are not bound by statute or otherwise to provide means of washing and bathing for any person except the inhabitants of the city of Cork.

This being the position of affairs, the Lord Chief Baron has pointed out that the practice with regard to rating property of this description is different in Dublin and Belfast from the practice in Cork, the town hall in Cork not being rated, while the town halls in Dublin and Belfast are. I may add that this is not confined to the town halls, but extends to baths. I wish in this connexion again to emphasize that the importance of the question is not confined to the cities of Dublin, Belfast, and Cork. It would be safe to say that the question may arise in a greater or less degree in respect of nearly all of the numerous towns which are either urban districts or are regulated by the provisions of the Towns Improvement Act, and which have, as part of their corporate property, buildings which, in a limited sense, are used for public purposes. Nor is the question confined to town halls. These constitute only a portion of the buildings which, in the large towns at any rate, would be exempt from poor rate if the judgment of the court below is to stand.

For the purpose of ascertaining the exact position, I have requested the Commissioner of Valuation to supply me, for the use of the Court, with a list of the municipal property in Ireland which, at the present time, is valued in his books and not exempted therein from poor rate, and he informs me that it reaches the very large figure of £164,876. Of this property—these are rough figures—between £12,000 and £13,000 of the total valuation represents what may be strictly called town halls and municipal offices in Belfast, the valuation in the case of the city hall alone amounting to £9,400; but no doubt, for anything I know, there may be portions of that particular building which are not used for purely civic purposes, and I only use these figures to emphasize the seriousness of the question which underlies the present case.

Waterworks, which of course are situated in extra-municipal districts, come to in or about one-fourth of the total amount. Large sums are placed on fire-brigade stations, markets and tolls, public baths and wash-houses, and in the city of Dublin the Mansion House is valued at £400. In Dublin, electric light works, and in Belfast, gas works, are assessed; and in the county borough of Londonderry we have the very high valuation of £975 placed on the markets. The amounts of the valuations of the municipal buildings in the small towns in Ireland, though slight in themselves, represent in the aggregate a very substantial sum.

The important point about these valuations is that they have been imposed ever since the Court of Queen's Bench in this country, more than forty years ago, decided, as I conceive, in the case of *The Mayor of Limerick* v. *the Commissioner of Valuation* (1), the question which is re-agitated in the present case, in a different manner from which it has now been decided by the learned judges of the King's Bench Division in the judgment under appeal. I can find no reference in the judgments either to that decision or to the condition of affairs which it has unquestionably brought about, from which I must infer that the Court did not consider that it was in any way an authority, although, as I think, it was such. The case is one which I shall deal with more fully hereafter.

But the matter does not end there. *The Limerick Case* (1), which it is believed in effect regulated the rating of this class of municipal property since the year 1872, was followed by the Public Health Act of 1878; and since 1878 the borrowing powers

(1) I. R. 6 C. L. 420.

under that Act, which are controlled by sects. 237 and 238, depend on the property valued and rated, and the larger the amount of the property exempt, the less becomes the borrowing power. I should certainly hesitate in the year 1916, unless coerced to do so, to tear up the basis on which these provisions of the Public Health Act have been worked since 1878, and large sums borrowed.

I would not lay so much stress on this but for the fact that when the point decided in the *Londonderry Bridge Case* (1) was sought to be re-agitated in this Court in the *Sligo Harbour Case* (2) the judges in this court, whether approving or disapproving of the principle of the former case, laid stress upon the great public disadvantage of altering a system which had been in existence for so many years, and on the basis of which moneys had been expended and properties dealt with. This view is, to my mind, equally legitimate in considering the issue here.

I of course agree that the words "public purposes" in the exemption section of the Valuation Act (17 & 18 Vict. c. 8) cannot, having regard to the decisions which have been given, be construed in a different sense from that in which it is used in sect. 63 of the Poor Relief Act (1 & 2 Vict. c. 56). Undoubtedly Walker L.J., in the *Sligo Harbour Case* (2), thought that there might be a difference between the two sections, but he considered that this question was not open to him, and it is not open to us.

I think that the summary of the Lord Chief Baron of the three classes of cases which may arise in connexion with exemption is a most convenient one, and I adopt it. He says that, speaking generally, the word "public" may be used, in reference to property, in any of three senses—first, as that which belongs to the Crown as the Government of the country; secondly, as that in which each member of the public has an interest, as for instance a public road; and, thirdly, as that in which each member of a limited and defined class of the public has an interest, *e.g.* the ratepayers of a particular union, barony, county or city.

Now, while in England, since the *Mersey Docks Case* (3), the word "public" in connexion with the question of rating is confined to property which belongs to the Crown, in this country, since the

(1) I. R. 2 C. L. 577.
(2) [1899] 2 I. R. 214.
(3) 11 H. L. C. 443.

Londonderry Bridge Case (1), the word "public" in connexion with the question of exemption from poor rate must bear a more extended meaning; and since that case there have from time to time been a number of cases, including the *Belfast Harbour Case* (2) and the *Sligo Harbour Case* (3), exempting specific property on the authority of that decision.

With regard to the third class of case, which is what we have to deal with here, as pointed out by the Lord Chief Baron there has been some difference in practice. The difference, however, has not been so much as the Lord Chief Baron thought. He had not the figures before him.

As the *Londonderry Bridge Case* (1) is the foundation of the law in Ireland on the second class of case, I think it convenient to refer to it here.

The Londonderry Bridge Act, which was passed on the 19th April, 1859, having recited certain prior Acts as to construction of a bridge and its transfer to commissioners, further recited "that it would be of great advantage to the inhabitants of the city of Londonderry and the neighbourhood thereof, and to the public frequenting the same" (that is to say, not the public represented by the inhabitants of the city of Derry, but the greater public without restriction of area), "if the construction of the bridge, approaches, and works, authorized by the Act of 1854 were abandoned, and if in lieu thereof the commissioners were empowered to construct the bridge, &c., in this Act mentioned." There were then provisions as to the construction of railways and roads which are immaterial, except the provision in sect. 38 that, "When the Commissioners shall have paved, flagged, and completed the new roads and approaches to the satisfaction of the Londonderry Council, the said roads and approaches shall for ever thereafter become public highways within the said borough, to be maintained in the same manner as the other streets within the borough." Powers were given to levy tolls, but it was provided by sect. 81 that a sinking fund for repayment of moneys borrowed should be provided, and that the ultimate residue of the tolls should be invested and applied in forming a fund for the

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(1) I. R. 2 C. L. 577.

(2) [1897] 2 I. R. 516.

(3) [1899] 2 I. R. 214.

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annual expenses connected with the said bridge, to the end that same might become toll free. That is, toll free for everyone of Her Majesty's subjects. The effect of the statute was, as stated in the special case, to create, so far as the bridge was concerned, a public highway open to and to be used as of right by all Her Majesty's subjects, and not confined to any locality. Let us see how the judges dealt with these words in their judgments. To take the language of Lord O'Hagan: "It was established that the tolls are not to be employed for any private profit, and that the commissioners by whom they are administered have in them no beneficial interest, and are bound to devote them, and do in fact devote them, only to the establishment and maintenance of a work which is a public highway, not for the exclusive advantage of an individual person, a special locality, or a limited class, but for the use of all Her Majesty's subjects." And again, at p. 584, he says: "These terms are simple and explicit in themselves, and it seems to me difficult to imagine a case in which their applicability could be more clear than this in which a public work is created solely for the public benefit, from which there is to be no levy, save for the absolute expenses of its making and maintenance, and which is to be for ever devoted, not to the use of any district or of any class, but of all Her Majesty's subjects without exception." (That must mean, not a user *ex gratia*, but a user as of right.) Chief Justice Monahan (p. 598) says, referring to the purpose of the Act: "Now, what is the object of all this? It is to establish a bridge toll free for all Her Majesty's subjects. I confess I should say clearly a public purpose." FitzGerald J. (p. 597) says: "In my opinion the maintenance of a public highway for all the Queen's subjects is a public purpose."

It is, accordingly, to my mind, fairly clear that the dominant fact which induced the majority of the Court to hold in that case that under the Irish statutes the property was exempt, was (apart from the question of Crown property) that if all the King's subjects as of right could use it, the case would come within the scope of the exemption contained in the statute of 1852.

I admit that the *Londonderry Bridge Case* (1) did not determine postively that the third class was liable, and this question has now to be decided by us, if not for the first time, at all events for the first time in this clear and definite way; but I think that I am entitled legitimately to draw this inference, that when all the judges who formed the majority of the Exchequer Chamber considered it absolutely necessary to emphasize the universally public nature of the right which in that case was held to give exemption, it was clearly their intention that their decision should not extend any further. Nay more, they considered the English authorities for the purpose of seeing in what sense the word "public" was used in the statute, and when they considered these authorities there was facing them in these cases, to my mind, even a distinct repudiation of the extension of the doctrine of exemption to this third class of property.

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(1) I. R. 2 C. L. 577.

It is one of the misfortunes of these rating cases in Ireland that we are set the difficult task of having to find out what exactly certain English cases, some decided before 1838, and some between 1828 and 1852, must be taken as authority for in Ireland, when, so far as England is concerned, they were, in fact, wrongly decided. This is one of the difficulties which I feel in approaching this question, but it is a task which has to be undertaken. It was undertaken in the *Londonderry Bridge Case* (1), in the *Belfast Harbour Case* (2), and by the Lord Chief Baron in the present case.

It is not for me to express either assent or dissent with regard to the decision in the *Londonderry Bridge Case* (1). I am not at liberty to do so, but I am at liberty to go as far as Walker L.J. went in the *Sligo Harbour Case* (3), in which, differing from FitzGibbon L.J., he expressed his dissatisfaction with the result arrived at in the earlier case. But, dissatisfaction or not, the *Londonderry Bridge Case* (1) must be followed in all cases coming within it, and this task of perusing authorities which werewrong, to see how, being wrong, they are to be dealt with in this country, must be faced.

Although not actually the first in time, I find it convenient to refer to the case of the *King* v. *Commissioners of Salter's Load Sluice* (4) first, in order to emphasize what I conceive had been decided in that and the following cases at the time of the passing of our General Valuation Act of 1852. It was held that the Commissioners of Salter's Load Sluice were not rateable in respect of tolls, because they had no beneficial interest in them, the whole of the tolls being devoted to public purposes; and I desire to emphasize that the public purpose there was the preservation of the navigation of the canal for everyone, not merely for the inhabitants of a limited area. Whatever may have been the ultimate application of surplus tolls, there was a direct benefit to all the King's subjects.

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(1) I. R. 2 C. L. 577.
(2) [1897] 2 I. R. 516.
(3) [1899] 2 I. R. 214.
(4) 4 T. R. 730.

The King v. *Inhabitants of Liverpool* (1) was decided in the year 1827. In that case the King's Bench Division, following the decision in the *Salter's Load Sluice Case* (2), held that tolls taken in connexion with the Liverpool Docks were in a similar position to the tolls taken in the earlier case, being devoted entirely to public purposes, and that the trustees of the docks were not rateable. It is to be observed that in that case, as in the *Sligo Harbour Case* (3), the docks were public docks which could be used as of right by everyone paying tolls.

In *The King* v. *Trustees of the River Weaver* (4), *The King* v. *The Inhabitants of Liverpool* (1) was followed, and the trustees were held not to be rateable, on the ground that the surplus tolls were to be applied for the repairing and maintaining of bridges and highways, and that these were public purposes, and that no part of the moneys could be applied to private purposes. (Bailey J., page 73.)

The public purposes in those three cases seem practically to have been purposes for the benefit of all the King's subjects, and not of a limited community or class.

Next came the case of *The Governors of the Bristol Poor* v. *Wait* (5). In that case the property lay outside the district of the governors, but this did not apparently affect the decision. The Governors of the Poor of Bristol had taken property outside the limits of the city for the purposes of putting out their paupers, either to lodge them or employ them. In part of the property the paupers had been employed in a manufacture which was stated to be a losing concern. It was held that they were rateable whether the employment of the paupers was profitable or not. Lord Denman C.J., who delivered the judgment of the Court, puts the case of the governors having taken 100 acres of land and employed the paupers on it, as a beneficial mode, in their opinion, of disposing of the poor; and he says, "Suppose, also, that the return, whatever it might be, was applied solely towards the maintenance of the poor who had laboured on the farm, or of those who were unfit for labour, and had been left behind; how can this constitute a better claim to exemption from rateability in the parish where the property lies than a *losing* occupation, which, it is quite certain, does not affect the question of liability at all? The same rule must, of course, apply to every species of property."

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(1) 7 B. & C. 61.

(2) 4 T. R. 730.

(3) [1899] 2 I. R. 214.

(4) 7 B. & C., p. 70, note.

(5) 5 A. & E. 1.

In that case the property was certainly used for public purposes, in the limited sense, and the question is, how is the case to be reconciled with the prior authorities? It has unquestionably been treated as at variance with them by all the judges who have from time to time considered the case.

The real difficulty arises from the next case, *The Queen* v. *The Mayor of Liverpool* (1), and, beyond all question, it supports the proposition, so far as the law in England was concerned, that before the *Mersey Docks Case* (2), the third class of case was exempt. In that case the rents and profits of the hereditaments were, by statute, payable to the borough fund, to be applied for purposes of a local character, and it was held that the hereditaments were exempt from rateability. Lord Denman C.J., who delivered the judgment of the Court, stated that it was impossible, substantially, to distinguish the case from the cases of *The King* v. *The Inhabitants of Liverpool* (3), and *The King* v. *The Trustees of the River Weaver Navigation Co.* (4), especially the latter. There is no doubt, therefore, as I have said, that if that case contains the law applicable now in this country, it is as clear an authority as can be that the third class of case comes within the exemption. The Lord Chief Baron does not hesitate to hold that the case is law in this country. I do. To hold so would be to hold that the decision of

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(1) 9 A. & E. 435.

(2) 11 H. L. C. 443.

(3) 7 B. & C. 61.

(4) *Ib.*, p. 70, note.

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our Queen's Bench Division in *The Mayor of Limerick* v. *The Commissioners of Valuation* (1), as I understand it, where all the profits went into the borough fund, is wrong. The Lord Chief Baron, as I have said, does not hesitate to express his opinion. He says, "In a more limited sense, however, some assistance is derived from the subsequent case of *The Queen* v. *The Mayor of Liverpool* (2). The 5 & 6 Wm. 4, c. 76, the English Municipal Corporations Act, had compelled the corporation to pay the surplus of the dock rates into the borough fund, and for this reason the Queen's Bench in England held, in 1839, that the effect of this enactment was to render the corporation no longer liable to be rated in respect of property occupied by them, and the statute 4 & 5 Vict. c. 48 recognizes that decision as correct. I admit that, in consequence of the decision in the House of Lords in the *Mersey Docks Case* (3), notwithstanding that statute the case of *The Queen* v. *The Mayor of Liverpool* (2) can be no longer considered an authority so far as it decides that such a corporation is, in England, exempt from rates; but it is still law so far as it decides that, since our Municipal Corporations Act (3 & 4 Vict. c. 108), corporate property in this country is held for public purposes, and that, too, in reference to rating."

This view was certainly placed before the Court of Queen's Bench in the *Limerick Case* (4). Whiteside C.J. says (p. 430), "The next case is *The Queen* v. *Liverpool* (5), which was cited to prove that by virtue of the Municipal Corporations Act, although the fund raised would otherwise have been rateable, the purposes and uses to which it is to be applied under the statute exempt it; and in that case the principle was affirmed that, because corporate funds were appropriated to public purposes of the kind therein mentioned, therefore no poor rate was payable thereon. It is said that the 4th & 5th Vict. c. 48, which cured the mischief in England by making corporations liable in respect of their property, does not apply to Ireland; and that, therefore, this country is subject to the law as declared by the decisions previous to the 4 & 5 Vict. c. 48. That Act, however, is not declaratory, and

(1) I. R. 6 C. L. 420.
(2) 9 A. & E. 435.
(3) 11 H. L. C. 443.
(4) I. R. 6 C. L. 420.
(5) 9 A. & E. 435.

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therefore it left the law, in cases which did not fall within its provisions, to be settled by judicial decisions." He is of opinion, and I agree with his view, that the English statute which was passed to cure the mischief in England, and which seems to recognize the binding authority of *The Queen* v. *The Mayor of Liverpool* (1), cannot affect the question in this country; and I think that we must consider not only the authorities previous to the Irish Poor Relief Act of 1838, but also the subsequent authorities down to the year 1852, for the purpose of seeing what was the condition of the law in Ireland when the General Valuation Act of 1852 was passed.

Coming to the period between 1838 and 1852, the next case to which I wish to refer is *The Queen* v. *Badcock* (2), decided in the year 1845. Lord Denman C.J. in his judgment summarizes the previous cases, and draws this distinction between them (p. 800):—"In all the first class" (that is cases like *The King* v. *Inhabitants of Liverpool* (3)) "the public, as such, unlimited by the bounds of county, borough, or parish, had a substantial and direct interest in the benefit which the application of the funds produced; in the latter" (that is cases like *The Governors of Bristol Poor* v. *Wait* (4)) "the ratepayers, or at most the inhabitants, of certain parishes, were alone concerned in the benefit, direct or indirect," and he held that the case before him came within the latter category. In that case the ultimate surplus of the rents and profits—if there had been a surplus, which there never was in fact—would have been applicable to what in the limited sense might be looked on as a public purpose, namely, the benefit of the poor inhabitants of a parish (see p. 789).

In 1849 the authorities again came under consideration in *The Queen* v. *The Harrogate Commissioners* (5). The facts of that case are very striking. The Harrogate Commissioners had obtained a local Act which, after reciting that it would be of great advantage to the inhabitants of High and Low Harrogate, and to the public at large, if provisions were made as thereinafter mentioned, empowered the commissioners to build a pump-room, and to make a limited charge on persons frequenting it. I mention

(1) 9 A. & E. 435.
(2) 6 Q. B. 787.
(3) 7 B. & C. 61.
(4) 5 A. & E. 1.
(5) 15 Q. B. 1012.

this because the provisions of this Act are much the same as those in the Baths and Wash-houses Act, 1846, but stronger, since the local Act recites that the provisions would be of advantage "to the public at large." In that case moneys derived from the pump-room were not the subject of private profit. They were to be applied altogether for public purposes, using the term in its limited sense of local benefit. The case is, therefore, in its facts strikingly like the present one; and how did the Court deal with it? It was held that there was no exemption from rating, and it seems to me impossible to reconcile the case with *The Queen* v. *The Mayor of Liverpool* (1), which was pressed by counsel in the argument there. Lord Campbell C.J. says:—"It is not enough for the purpose of exemption that no personal advantage is reaped, otherwise every property held under trust would be exempted. It must be shown that all the profits are to be applied to public purposes; and I will not venture on any definition of non-liability which goes beyond that." Coleridge J. adopts the classification taken by Lord Denman in *The Queen* v. *Badcock* (2).

It must be admitted that the classification of the cases in *The Queen* v. *Badcock* (2) is not an exhaustive one. Blackburn J. points this out in *The Mersey Docks* v. *Cameron* (3), where he says (p. 473):—"The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of Government. But the principle thus laid down cannot be made to embrace either *The King* v. *The Trustees of the Weaver Navigation* (4), where the funds were applicable to the relief of the county rate of Cheshire, or *The Queen* v. *The Mayor of Liverpool* (1), where the funds were brought into the borough fund in relief of the borough rate in that particular borough."

This is a most important observation with regard to these cases, and one which undoubtedly gives me the greatest difficulty. If I could accept *simpliciter* the distinction which Blackburn J. says has been repeatedly quoted with approval, as governing every case, I should have no more difficulty; but certainly, as

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(1) 9 A. & E. 435.

(2) 6 Q. B. 787.

(3) 11 H. L. C. 443.

(4) 7 B. & C., p. 70, note.

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stated, it does not cover the *River Weaver Navigation Case* (1), nor *The Queen* v. *The Mayor of Liverpool* (2). In the *Mersey Docks Case* (3) it was not necessary to discover what the true distinction was, because the sweeping brush was applied there, and all the earlier cases were swept away.

The best solution I can arrive at is this, that even if there is an ultimate devolution of the possible profits of a municipal or local undertaking to local purposes, still there may be exemptions from rating if all the king's subjects *as of right* can take the benefit of the undertaking, but not if no such right exists. The cases, all of which have ceased to be authorities in England, must be reconciled somehow, and I adopt this method.

The first case in which I find this distinction relied on, so far as Ireland is concerned, is the *Limerick Case* (4), and as regards two of the judges, there can be no doubt as to what their view was. In that case all the surplus profits of the Limerick gas undertaking went in relief of the borough rate, and there was no private benefit at all. Whiteside C.J., at the close of his judgment, puts it in this way. "We are of opinion that the premises mentioned in the notice of appeal were not of a public nature, or used for a public purpose within the meaning of the 17 Vict. c. 8, sect. 2; that the profits derived from the gas works are only to be applied in exoneration of the improvement rate after the payment of all the proper outgoings, and that payment of the local rates is one of these proper outgoings, and that premises which were previously rateable did not become exempt after or by reason of the purchase of them by the corporation."

That distinction is not taken by the other judges, nor do I think it is the true distinction. Mr. Justice Barry, afterwards Lord Justice Barry, one of the ablest judges that ever sat in the Queen's Bench or in this Court, thus summarizes his view of the English authorities:—"The question then is, what is the meaning of 'public purposes' in this section? The English authorities, which on this point may be considered authorities notwithstanding the *Mersey Docks Case* (3), seem to me to present two views for our consideration. One, and (as I think) the right one, is that not only must the 'public purposes' be such as to exclude all private profit, but the advantages conferred must be for the benefit of the public at large. This view is that taken in the *Londonderry Bridge Case*(1), and I adopt the language of O'Hagan J., 'that the purpose must be for the benefit of the whole community, and not for the private or exclusive use of any members of it.' Now, do these Limerick gas works, purchased under the powers of the local Act, fall within the category of premises used for public purposes as thus defined? I certainly think not. The works are obviously carried on for the benefit of a limited class, in a limited locality—namely, the ratepayers of the borough of Limerick." FitzGerald J. says:—"The *Londonderry Bridge Case* (1), if it is good law, establishes that there may be a public purpose, and an occupation for the public service, which has no connexion with the service of the government of the country, and which exempts the premises from taxation. But even the *Londonderry Bridge Case* (1) shows that the public purpose must be one in which every member of the community has an interest. For instance, Monahan C.J. says, p. 598:—'Now, what is the object of all this? It is to establish a bridge toll free for all Her Majesty's subjects; I confess I should say, clearly a public purpose.' That is the foundation of the decision in the *Londonderry Bridge Case* (1); the Court of Exchequer Chamber held that the establishment of a bridge toll free, which any of Her Majesty's subjects might use, was a public purpose within the meaning of the Valuation Acts; and, sitting in this Court, we are bound by that decision, though certainly not to carry it any further. Let us now see what is the public purpose in the present case. No one outside the city of Limerick has the slightest interest in these works."

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(1) 7 B. & C., p. 0, note.
(2) 9 A. & E. 435.
(3) 11 H. L. C. 443.
(4) I. R. 6 C. L. 420.

The Lord Chief Baron, at the close of his judgment in the present case, says that he would be of opinion that these public baths and wash-houses were for all the public generally, and not for the purpose of the ratepayers of the borough of Cork alone. I should think, however, that his attention had not been called to the statute under which they were established, which negatives this view. No doubt everything that improves a locality is in one sense for the benefit of all the king's subjects, but that is not the sense in which as I conceive the word "public" is to be read in our Valuation Acts.

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(1) I. R. 2 C. L. 577.

I have now to refer to the judgment of Gibson J., in the *Belfast Harbour Case* (1). He says (p. 529), "The judgments of the majority in the Exchequer Chamber in the *Derry Case* (2) are founded on the interpretation of the 63rd section, and only one of the judges, O'Hagan J., purports to decide the construction of the Valuation Acts. The other three judges did not, however, indicate any disapproval of his opinion, which was adopted by Barry J., in *The Mayor of Limerick* v. *The Commissioner of Valuation* (3). I, therefore, feel bound to accept the *Derry Case* (2) as a binding authority in reference to the Valuation statutes. That case, explained and followed in the *Limerick Case* (3), decides two points: First, that public purposes extend beyond government purposes, within which exemption in England and Scotland is confined; second, that such purposes mean purposes in which all members of the community are interested, and not purposes for the benefit of individuals, a class or a locality."

This distinction was again considered by our Court of Appeal in the year 1899, in the *Sligo Harbour Case* (4). There is, in the judgment of FitzGibbon L.J., but in his judgment alone, and it is not the ground on which he decides the case, a passage which might be considered to be favourable to the more extended view of the right of exemption. He says (p. 224): "I cannot follow the attempts to exclude hereditaments otherwise public, upon distinctions as to the mode of raising the capital expended upon them, or as to the mode of applying an ultimate, but as yet unattained, surplus residue, so long as no private profit or use is (in the words of the Act of 1838) 'derived therefrom.'" He proceeds, however, and this is the ground on which he decides the case: "But, in any case, the Sligo Harbour Act excludes any private use of any such surplus, if it were realized; and the Sligo Harbour is open to use by all Her Majesty's subjects desiring to exercise the public rights of navigation, exactly in the same sense in which the Londonderry Bridge was open to those who desired to exercise the right of using a public highway." He there clearly recognizes what seems to me the fundamental distinction, namely, that there must be a right of the general public, as distinguished from a privilege granted to a limited community, of enjoying the building or property sought to be exempted. In the same sense I understand the judgment of Holmes L.J.

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(1) [1897] 2 I. R. 516.
(2) I. R. 2 C. L. 577.
(3) I. R. 6 C. L. 420.
(4) [1899] 2 I. R. 214.

The last case to which I shall refer is that of the *Pembroke Urban District Council* v. *The Commissioner of Valuation* (1). Lord O'Brien L.C.J., there says in his judgment (p. 437), that one of the material facts established was that the schools there claimed to be exempt from valuation were "open to all comers without limitation of class, locality, or creed." It was proved in that case that everyone, whether an inhabitant of the Pembroke Urban District or not, had a right to attend the schools and get instruction.

Thus I find this distinction taken in all these cases, and, for myself, I am of opinion that the decision in the *Londonderry Bridge Case* (2), adopted in the *Sligo Harbour Case* (3), is an authority not merely extending the exemption to the second class of cases mentioned in the summary of the Lord Chief Baron, but excluding by implication the third class, and, therefore, I think that the decision of the court below was wrong, and should be reversed.

CHERRY L.C.J. :—

The Lord Chancellor has dealt so fully with this appeal that it is only necessary for me to add a few words to what he has said.

An important question of law arises upon it, which is stated by Palles C.B. at the beginning of his judgment with his usual lucidity. "The main question for determination here," he says, "is whether 'municipal purposes' are 'public purposes' within the meaning of the Act 17 & 18 Vict. c. 8, sect. 2, so as to render hereditaments used exclusively for such purposes exempt from rating under the Poor Relief Acts." After a careful examination of the authorities bearing on the matter, he arrives at the conclusion that this question should be answered in the affirmative. His judgment is adopted by the other members of the Court; and, accordingly, if it is affirmed by this Court, it will have a far-reaching effect.

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(1) [1904] 2 I. R. 214.
(2) I. R. 2 C. L. 577.
(3) [1899] 2 I. R. 214.

The word "public," as used in this Act of Parliament, may be applied in three different significations. In its most restricted sense it may be used as applying only to Crown property, and as only exempting from liability to taxation property actually vested in the Crown. It has been frequently pointed out that such an interpretation would render the exemption unnecessary, inasmuch as Crown property is, as such, exempt from taxation unless it is specifically named as being liable by the statute imposing the tax. Accordingly, in the *Londonderry Bridge Case* (1), it was held to bear a broader meaning, and to apply to a bridge across which there was a public right of way open to all subjects of the Crown without exception, though the structure of the bridge was not vested in the Crown, but in local commissioners. To come within the exemption established by that case, however, not only must the "public purposes" be such as to exclude all private profit, but the advantages conferred must be for the benefit of the public at large—the whole community. The case, as explained by Gibson J. in *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (2), decides two points—"First, that public purposes extend beyond governmental purposes, within which exemption in England and Scotland is confined; second, that such purposes mean purposes in which all members of the community are interested, and *not purposes for the benefit of individuals, a class, or a locality*." If the learned judge is right in the last clause I have quoted from his judgment, then the *Londonderry Bridge Case* (1) is an authority distinctly against the view adopted by the King's Bench Division in this case; and if we are to follow it, as we are clearly bound to do, we must hold not only affirmatively that "public purposes" include purposes in which all members of the community are interested, but also, negatively, that they exclude purposes in which a benefit is

(1) I. R. 2 C. L. 577.

(2) [1897] 2 I. R., at p. 529.

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conferred only on a particular class, or the inhabitants of a particular locality.

That this is the true interpretation of the *Londonderry Bridge Case* (1) is made absolutely clear in the subsequent case of *The Mayor of Limerick* v. *Commissioner of Valuation.* (2) There it was held by the Court of Queen's Bench that gas-works acquired by the Corporation of Limerick under a special Act, and worked by them for the benefit of the ratepayers of Limerick, were not exempt from rating as being used for a public purpose. Each of the members of the Court in that case based his decision upon the ground that the works were carried on for the benefit of a limited class in a limited locality—namely the ratepayers of the borough of Limerick; and the decision in the *Londonderry Bridge Case* (1) was interpreted by all as excluding from any claim to exemption premises not used for the benefit of the whole community.

The Lord Chief Baron has not in his judgment referred to the case of *The Mayor of Limerick* v. *Commissioner of Valuation* (2) at all. Had he examined it with the same care that he has bestowed upon the English cases he refers to, he must have seen that it is quite inconsistent with the view which he takes that property used for the benefit of a limited and defined class of the public, such as the ratepayers of a particular locality, comes within the exemption of premises used for a "public purpose" within the meaning of the Valuation Acts. We cannot, in my opinion, adopt that view without definitely over-ruling the *Limerick Case* (2). This, no doubt, we could do, as it was the decision of a court of inferior jurisdiction to this court. But to do so would be a strong course to adopt, after it has been acted upon for a period of over forty years. Nor has it ever, so far as I am aware, been suggested that it was wrongly decided.

As to the English cases which are cited by the Chief Baron, I do not think that they give us much help. The English law as to valuation of premises and exemptions from rating is quite different from ours, and to make use of a case decided upon one statute for the purpose of interpreting a word or a phrase used in another Act is very frequently most misleading. Where the authorities are

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(1) I. R. 2 C. L. 577. (2) I. R. 6 C. L. 420.

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clear upon the particular section which is being interpreted, it is better, I think, to rely upon them.

I do not quite follow the reasoning of the Lord Chief Baron as to the borough rate. I understand that if the premises are not returned by the commissioner as exempt, technically they will be liable to pay borough rate as well as poor rate. But inasmuch as the hand to pay and the hand to receive are the same in this case, it makes no difference whether they are exempt or not. I do not think that this gives us any help in deciding the main question.

For these reasons I am of opinion that the decision of the court below on the first appeal ought to be reversed. As regards the second appeal, I agree also with the opinion of the Lord Chancellor, and the decision in this appeal also should, I think, be reversed, for the reasons which he has given.

Molony L.J. :—

I concur in the judgment of the Lord Chancellor.

Section 128 of 3 & 4 Vict. c. 108 (The Municipal Corporations Act, 1840) provides for the creation of the borough fund, and by section 131 the borough fund shall be applied (*inter alia*) towards the expense of providing and maintaining the corporate buildings, and in case the borough fund shall be more than sufficient to provide for the purposes mentioned, the surplus shall be applied for the public benefit of the inhabitants, and the improvement of the borough.

By the Municipal Corporations Act, 1860, power is given to mortgage the corporate property with the consent of the Local Government Board for Ireland.

Under the provisions of the Cork Cornmarket Act, 1889, the premises which had been theretofore vested in the Cornmarket trustees were transferred to the Corporation, and it is provided by section 15 that the Corporation might alter, improve, adapt, and maintain the present market building or buildings, so that the same, subject always to the primary use thereof for market purposes and the convenience of the persons resorting thereto for such purposes, might be used as municipal buildings and offices of the Corporation.

After the buildings had been taken over under the provisions of the statute, the Corporation decided to provide a hall for public meetings, and accordingly a hall was completed and furnished at a total cost of nearly £7000, and was, and is, maintained at the expense of the borough fund. The hall is given for public meetings at the nominal charge of 6*s.* per meeting, and is also used for concerts, bazaars, and lectures, for which £3 is charged. It is stated that the hall is sometimes used for meetings of the County Borough Council, and it is found by the case that the letting out of the hall for meetings did not disclose a profit.

In this state of facts the question to be determined is, whether the hall was altogether of a public nature, and used for public purposes, within the meaning of 15 & 16 Vict. c. 63, s. 16, and 17 & 18 Vict. c. 8, s. 2. I do not think that very much assistance is derived from the numerous English cases which have been so carefully analysed by the Lord Chancellor, with whose observations I fully agree. They are useful so far only as they show the state of judicial opinion on the question at the time of the passing of the Irish Poor Law Act and the Valuation Acts. All of them were considered by the House of Lords in the case of the *Mersey Docks Company* v. *Cameron* (1), and it was there conclusively determined that, so far as England was concerned, it was only property in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, that was exempt from being rateable to the relief of the poor under the provisions of 43 Elizabeth, c. 2. When it was attempted to apply this case to Ireland it was, of course, at once seen that it was conversant with a statute containing no exemption from rating by reason of hereditaments being used or occupied for public purposes, and, accordingly, the whole matter came to be considered in the light of the Irish statutes and decisions in the very well-known case of *The Guardians of the Londonderry Union* v. *The Londonderry Bridge Commissioners* (2). In that case the majority of the court held that a bridge found to be a public highway, "open to, and used by all Her Majesty's subjects," is a bridge "dedicated to public purposes; occupied for the same purposes," and exempt from liability to poor rate. The real ground of the decision was, that, in order to come within the exemption, each member of the public must have an interest in the matter.

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(1) 11 H. L. C. 443.

(2) I. R. 2 C. L. 577.

The question was fully considered in this court in the case of *The Commissioner of Valuation* v. *The Sligo Harbour Commissioners* (1), where it was held that the property of the Sligo Harbour Commissioners was dedicated to, or used for, public purposes within the exemption, and was within the exemption in the Valuation Acts. Holmes L.J. there states (at p. 228), "The second conclusion is that *The Guardians of the Londonderry Union* v. *The Londonderry Bridge Commissioners* (2) is an authority precisely in point. The true ground of the judgment in that case was that a bridge, open as of right to every member of the public on payment of a toll, which toll could only be used for the benefit of the public in connexion with the bridge itself, and could never be a source of private profit, was dedicated to, and used for, public purposes."

In the case of *The Mayor of Limerick* v. *The Commissioner of Valuation* (3) it was sought to extend the principle of the Londonderry case to gas-works which had been acquired by the Corporation of Limerick. The Corporation manufactured and sold gas; and the surplus profits, after providing for certain charges and expenses, were applied in pursuance of the provisions of a special Act in reducing the town improvement rate. The court unanimously held that the premises were rateable, on the ground that the profit was not one in which every member of the community had an interest, but only the ratepayers of Limerick. Fitzgerald J., at p. 432, says: "*The Londonderry Bridge Case* (2) shows that the public purpose must be one in which every member of the community has an interest. For instance, Monahan C.J. says, at p. 598, 'Now, what is the object of all this? It is to establish a bridge, toll free for all Her Majesty's subjects. I confess I should say clearly a public purpose.' That is the foundation of the decision in the *Londonderry Case* (2); the Court of Exchequer Chamber held that the establishment of a bridge toll free which any of Her Majesty's subjects might use, was a public purpose within the meaning of the Valuation Acts, and, sitting in this court, we are bound by that decision, though certainly not to carry it any further. Let us now see what is the public purpose in the present case. No one outside Limerick has the slightest interest in these works."

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(1) [1899] 2 I. R. 214.
(2) I. R. 2 C. L. 577.
(3) I. R. 6 C. L. 420.

I am of opinion that the *Londonderry Case* (1) was rightly decided, and that the Municipal Hall is not exempt from rating, on the ground that it is not a hereditament in which every member of the public is or could be interested, but only ratepayers of the city of Cork, and I am quite unable to accept the conclusion of the King's Bench Division that "municipal purposes" are "public purposes," within the meaning of the Valuation Acts.

The position of the public baths and wash-houses has next to be considered. By the 9th & 10th Vict. c. 87, intituled "An Act for permitting the voluntary establishment in Boroughs and certain Cities and Towns in Ireland of Public Baths and Wash-houses," power was given to erect buildings suitable for public baths and wash-houses, and to furnish and supply the same with all requisite furniture, fittings and conveniences, and the expense of so doing was charged upon the borough fund. Section 20 of the Act provides that bye-laws might be made for the regulation of baths and wash-houses, and that the Council might charge for their use such sums as they should think fit, but not exceeding such charges as are mentioned in Schedule B, annexed to the Act. Schedule B provides that the maximum charge for a bath for the labouring classes is one penny for a cold bath, and two pence for a warm bath, for each person over eight years old; and provides that such shall be the maximum charge during the first seven years after the establishments are opened for public use, and after such seven years, except only so long after such seven years as higher charges may be necessary for defraying the current expenses of the establishments. The Corporation adopted the Act on the 23rd June, 1899, and baths and wash-houses were erected and furnished at a total expenditure of £7,828. All receipts from the baths are paid into the borough fund, and the baths are maintained at the expense of the same fund. There are two baths of equal size, one of which is absolutely free,

(1) I. R. 2 C. L. 577.

and a charge is made for the use of the other according to the scale set forth in Schedule B of the Act, but the expenditure each year greatly exceeds the receipts.

It is found in the case that no member of the public could, as of right, claim to use the baths; but the Recorder also finds that any member of the public who desired to use said baths, and who complied with the terms of the bye-laws, and, in respect of the paying bath, who paid the charge for using the same, would be permitted to use the bath no matter where he resided.

The question then is as to whether, under the circumstances, the premises come within the principle of the *Londonderry Case* (1). In the *Londonderry Case* (1) the bridge was found to be a public highway, open to and used by all Her Majesty's subjects on payment of a toll, while in the present case it is found that no member of the public could, as of right, claim to use the baths. The preamble of the Londonderry Bridge Act (22 Vict. c. vii) states that the bridge would be of great advantage to "the inhabitants of the City of Londonderry and the neighbourhood thereof, and to the public frequenting the same," while the preamble to the Baths and Wash-houses Act is as follows:—"Whereas it is desirable for the health, comfort, and welfare of the inhabitants of cities and towns in Ireland to encourage the establishment therein of public baths and wash-houses, and public open bathing-places." I think this preamble clearly shows that what the Legislature had in contemplation was, not the benefit of the public generally, but to give power to the inhabitants of boroughs to adopt an Act for the benefit of the inhabitants of the particular borough taking advantage of its provisions.

I am, therefore, unable to agree with the finding of the King's Bench Division, that the baths and wash-houses were for the benefit of the public generally, and, in my opinion, the questions in both cases ought be answered in the negative, and the orders appealed from reversed with costs.

Solicitor for the Corporation of Cork: *Barry C. Galvin.*

Solicitor for the Commissioner of Valuation: *The Treasury Solicitor.*

J. G. T.

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(1) I. R. 2 C. L. 577.

K. B. Div.
1915.
Nov. 25, 26.
Dec. 20.

LARRINAGA STEAMSHIP COMPANY, LIMITED v. GREEN & CO. (1).

(1915. No. 2616.)

Ship—Charter-party—Demurrage—"Reporting Day"—Report to Customs Authorities or Consignees?—Arrived Vessel—Port—Stowage—Alleged Negligence.

A vessel with a cargo of wheat for the port of Cork for the endorsees of two bills of lading was, according to the charter-party, to be discharged at the rate of 450 tons per day, Sundays and holidays excepted, "reporting day not to count." By the charter-party the master was required to report to charterers, or their agents, immediately on the arrival of the vessel at port of discharge, and enter the vessel at the Custom House in their name. The holders of bills of lading were entitled to name the discharging dock, provided they did so as soon as the arrival of the vessel was notified to the charterers' agents by the master. For each day's detention beyond the lay days required under the stipulated conditions, demurrage was to be paid by the charterers or their agents at a fixed rate.

The wheat, together with another consignment for Glasgow, was loaded in pursuance of directions given by the charterers, and the manner of stowage confined the disharge of the Cork consignees' part of the cargo to two hatches instead of from all the hatches. This restriction in the facilities caused delay in the discharge.

The vessel reached Queenstown, within the geographical limits of the port of Cork, on the 20th of December, 1914; and on the following day the master and ship's agent reported to the Customs authorities that she was then lying at South Deep-Water Quay, Cork, which as a matter fact she did not reach till the 22nd of December. On the latter date the master notified the consignees that the vessel was moored in a discharging berth, ready to discharge, and that "reporting day was done yesterday at the Custom House as per charter-party." The discharge of the ship began on the 23rd of December, and was not finished until the 6th of January, 1915. Under the conditions prescribed by the charter-party the discharge should have been completed within eight working days. The shipowners brought an action for demurrage.

Held, that the vessel did not reach the commercial area of the port of Cork till the 22nd of December, and that "reporting day" in the charter-party referred to a report of the vessel to the consignees as an arrived vessel effectively placed at their disposal and prepared to allow discharge; and that inasmuch as such report was not made until the 22nd of December, that day was excluded from the number of lay days.

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(1) Before Gibson and Kenny JJ.

Held also, that negligence in stowage could not be attributed to the shipowners, the mode of stowage having been directed by the shippers, who were entitled to give such directions.

Ohrloff v. *Briscall*, (L. R. 1 P. C. 231) and the judgment of Dr. Lushington therein, discussed.

New Trial Motion.

The plaintiffs were owners of the British steamship "Ventura de Larrinaga" of 2,970 tons register, of the port of Liverpool, and the defendants were corn importers carrying on business in the city of Cork.

The plaintiffs' claim was for £247 10*s.*, being demurrage payable by the defendants to the plaintiffs, under two bills of lading, dated the 29th of October, 1914, and charter-party, dated 18th of September, 1914, for the detention in Cork of the S.S. "Ventura de Larrinaga" from the 2nd of January, 1915, to the 6th of January, 1915, both days inclusive, said amount being calculated as per conditions of charter-party at the rate of four pence per registered ton per day. By the bills of lading it was provided that 57,916 sacks of wheat, amounting to 3,555 tons, shipped by Messrs. Strauss & Co. of London, on the "Ventura," should be delivered at the port of discharge to the order of Messrs. Strauss & Co. or their assigns, subject to the conditions of the charter-party, by which several ports of discharge were named as being within the charterers' option. All cargoes having no fixed lay days were to be discharged in Cork (if Cork was selected) at the average rate of 450 tons per day. Messrs. Strauss & Co. endorsed the bills of lading to the defendants. The bills of lading contained the same option as to ports of discharge as the charter-party.

In their defence, the defendants denied that they had detained the vessel at the port of Cork, as alleged, and in the alternative pleaded that if there was any detention it was due to circumstances beyond their control; namely, (*a*) the neglect and improper stowage of the cargo, which made it impossible for the defendants to unload the vessel in the manner provided and

K. B. Div. 1915. LARRINAGA S.S. COMPANY *v.* GREEN & CO.

contemplated by the charter-party, and (*b*) the incompetence of the winchers employed by the plaintiffs.

The case was tried at the Trinity Sittings, 1915, before Dodd, J., and a special jury of the city of Dublin, when the following matters were proved or admitted:—

According to the charter-party the vessel was to be well stowed and dunnaged, and the stowage was to be under the captain's supervision and direction. By clause 11 all grain cargoes for steamers having no fixed lay days were to be discharged at the rate of 450 tons per day at Cork, Sundays and holidays excepted, and "reporting day" not to count. Clause 16 contained, among others, the following provisions:—"The master to report to charterers, or their agents, immediately on arrival of the vessel at port of discharge, and enter the vessel at the Custom House in their name. Vessel to discharge afloat with dispatch, according to custom at port of discharge for steamers, except as otherwise provided. . . . The holders of bills of lading, representing the greater proportion of the cargo, are to be entitled to name the discharging dock, provided they avail themselves of this privilege as soon as the arrival of the vessel is notified to charterers' agents by the master or his agents, and the dock to be one into which the vessel can safely enter at next high water, and commence to discharge without unreasonable delay, and where she can safely lie at all times, and provided the vessel is not thereby compelled to lie in an unsafe anchorage waiting for docking orders." Clause 17 provided that for every day's detention or demurrage at port of discharge four pence per net registered ton should be paid by the holders of bills of lading. The shippers had, both under the charter-party and bills of lading, the option of ordering the steamer to discharge at two ports on the same coast, or at one port on the east coast (United Kingdom) not north of Hull, and at one port in the Bristol Channel or at one port on the Continent, and at one port on the east coast or at Cork, Dublin, or Belfast. Ports, unless otherwise stated, were to be always in geographical rotation, and orders for the second port were to be given within forty-eight hours after arrival at the first port of discharge. "Should steamer be ordered to discharge at a place where there was not sufficient water to enter the first tide after arrival without lightening, and be always afloat, lay days to count from forty-eight hours after arrival at a safe anchorage for similar vessels bound to such places, and any lighterage incurred to enable her to reach the place of discharge is to be at the risk and expense of the receivers of the cargo, any custom of the port or place to the contrary notwithstanding."

There were altogether four bills of lading, each set of two comprising about equal quantities of wheat, and two of these were endorsed by the charterers, Messrs. Strauss & Co., to the defendants. One was for 28,945 sacks of white walla wheat, and the other for 28,971 sacks of blue stem wheat. The consignment included in the other two bills of lading was ordered to Glasgow.

From the evidence of James Marshall, captain of the "Ventura," it appeared that the vessel was loaded at Portland (Oregon) to the option of the charterers. He loaded absolutely at the orders of Strauss & Co., who gave him a rough diagram indicating how the stowage was to be carried out. The chief officer made out this plan of the loading at the direction of Strauss.

It further appeared that the cargo for the defendants was stowed in two holds and the bunker-hatch, and that delivery could have been effected only from these instead of from all the hatches, as could have been done if the cargo for the Cork consignees had, at the time of loading, been placed on the top of each hatch. According to the defendants' witnesses, this arrangement hampered and delayed the discharging of the cargo. The vessel had four holds, each operated by a hatch. Two of the holds and the bunker-hatch were appropriated to the part of the cargo discharged at Cork.

On the 30th of October the "Ventura" left Portland for Norfolk, in Virginia, her coaling port, and there the captain received orders to proceed to Cork. The vessel left Norfolk early in December, and arrived off Queenstown on Sunday evening, the 20th of December. Owing to the state of the tide and the prohibition against navigation of the river at night, the vessel did not reach Cork till Tuesday, the 22nd. On Monday, the 21st, Mr. A. C. Horne, the ship's agent at Cork, and the captain, reported to the Customs authorities that the ship was then lying at South Deep-Water Quay, Cork. In a letter to his principals, dated the 22nd of December, Mr. Horne stated: "We brought Captain

Marshall up here yesterday from Queenstown, and perfected reporting at Customs, which we consider we were perfectly entitled to do, the steamer having arrived within the port of Cork limits when she was at Queenstown, and consequently we consider steamer's lay days count as from, say, 10 a.m. this day, yesterday being 'reporting day.'" As a matter of fact, the vessel berthed alongside the South Jetties at 9.30 a.m. on Tuesday, the 22nd of December; and on that day the captain notified the consignees that the "Ventura" was moored in discharging berth, ready to discharge cargo. He added: "reporting day was done yesterday at the Custom House, as per clause in charter-party." On Wednesday, the 23rd, the consignees commenced to discharge, and did not finish the operation till the 6th of January, 1915. On the 24th of December all the men took a half-holiday.

On behalf of the defendants evidence was given showing that the term "arrived ship" did not apply to a ship at Queenstown that was to discharge at Cork.

The remainder of the evidence dealt with discharge by hand winches, and the alleged inefficiency of the winchers employed —questions not material to the present report.

Dodd J. decided that the "reporting day" was the reporting to the Customs, and directed a verdict for the full amount, which was entered accordingly.

The defendants now moved for a new trial, on the grounds of misdirection and non-direction, and that the learned judge at the trial improperly, in point of law, construed clause 16 of the charter-party, and wrongly directed the jury as to the legal effect and purport thereof.

S. L. Brown K.C. (with him *FitzGibbon K.C.*, the *Hon. Cecil Atkinson K.C.*, and *J. F. Moriarty*), for the defendants :—

We say that the lay days began on the 23rd of December. "Reporting day," in clause 11 of the charter-party, must refer to the notification to the charterers under clause 16 that the vessel has actually arrived at a port where it can be discharged, and that it is ready for discharge. Although Queenstown may be within the geographical limits of the port of Cork, the "Ventura" was not an arrived vessel when she reached there, as she was then at least seventeen miles distant from the dock where discharge was to be effected. The word "port" in a charter-party must be construed by reference to the meaning commonly given to it by merchants and shippers. The meaning of the word is discussed at length in *Leonis Steamship Company, Ltd.* v. *Rank* (1). From the judgment of Kennedy L.J., and the authorities reviewed by him in that case, it is clear that the word "port" in a charter-party does not mean the geographical limits of the port, but signifies the commercial area. "If, then, we find a charter-party naming a 'port' simply, and without further particularity or qualification, as the destination for the purpose of loading or unloading, we must construe it in regard to the 'arrival' of the ship at that destination as meaning that port in its commercial sense, that is to say, as it would be understood by persons engaged in shipping business, and in regard to the arrival of the ship there for the purposes of the charter-party": *Leonis Steamship Company* v. *Rank* (1), *per* Kennedy L.J., at p. 520. The "Ventura" was not an "arrived" ship within the meaning of that case until the 22nd of December, and that day was the "reporting day." The words in the charter-party referring to the rate of discharge mean that the vessel was to be discharged in a number of days calculated at that rate, not in a number of hours calculated at that rate; and that, if a fraction of a day is required for the completion of the discharge, the charterer is entitled to the whole of that day: *Houlder* v. *Weir* (2). Our maximum liability, if we are liable at all, is four days, and the minimum liability is two days.

We submit that there was evidence showing that the cargo was improperly and negligently stowed; and also establishing that the labour provided in Cork was inefficient. The learned judge ought to have submitted questions to the jury on these two points. It was the duty of the shipowners to stow the cargo; and they cannot recover demurrage for any delay in discharge due to inconvenient and improper stowage: *Harris* v. *Best, Ryley & Co.* (3).

Transactions between the charterers and the shipowners do not affect the position of the assignee of a bill of lading: *Ohrloff* v. *Briscall* (4).

(1) [1908] 1 K. B. 499.

(2) [1905] 2 K. B. 267.

(3) 68 L. T. N. S. 76.

(4) L. R. 1 P. C., 231, at p. 235.

Serjeant Sullivan K.C., and *H. D. Conner K.C.* (with them *G. J. Daly*), for the plaintiffs :—

The object of reporting a ship is to comply with the provisions of the Merchant Shipping Act, 1894. Once a ship comes within a port it is bound to report; and the expression "report," as defined by sect. 492, means the report required by the Customs laws to be made by the master of a reporting ship. The "Ventura" was a "reported" ship on the 21st December, because "reporting day" in the charter-party is the statutory reporting day. An obligation was imposed on the ship to give notice of arrival to the consignees; and the word used in that context was not "report" but "notify."

Our answer to the complaint made about improper stowage is that the charterers had the absolute right to prescribe, and did in fact prescribe, the way in which the cargo was to be stowed in the ship. Until December, after the loading had been completed, the captain had no directions as to whether he was to go to one or two ports.

Once the lay days begin to run, and the ship is detained beyond those days, the consignees are liable for demurrage, unless they can show that their inability to discharge the cargo within the stipulated time was due to default of the ship: *Budgett* v. *Binnington* (1). There was no evidence of negligence on the part of the ship.

In the unloading of the cargo the ship's stevedore employed the best men available at the port of Cork.

FitzGibbon K.C., in reply :—

By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), sect. 50, the master of every ship is bound, within twenty-four hours after arrival at any port in the United Kingdom, to make due report of such ship to the Customs; but that is not the report contemplated by the charter-party in this case. The day not to count in the calculation of lay days is the day on which report was made to the consignees.

We submit that there was ample evidence of unusual and improper stowage, which undoubtedly restricted the facilities for discharge.

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(1) [1891] 1 Q. B. 35.

We submit that the defendants were entitled to a direction on two points, namely, that the stowage was unusual and improper in restricting the number of hatches for discharge to two, and that the acts of the shippers did not bind the indorsees of the bills of lading. If we were not entitled to a direction, the jury ought to have been asked—(*a*) Whether Strauss and Company gave the directions as to stowage alleged by the captain; (*b*) even if they gave such directions, whether in view of the evidence the captain ought not to have stowed portion of his first port cargo in the shelter-deck; and (*c*) whether the winchers were inefficient.

Cur. adv. vult.

GIBSON J.:—

Dec. 20.

This action was for five days' demurrage from January 2nd to January 6th, 1915 (both days inclusive), amounting to £247 10s. The defence of the defendants, indorsees of the bills of lading, traversed all the averments in the statement of claim, but at the trial only three of the defences were relied on:—(1) That December 23rd was a lay day, the reporting day excluded by clause 11 of the charter-party being December 22nd, so that the discharge was to begin on December 23rd. (2) That plaintiffs negligently stowed the cargo in an improper manner, and in such a way as to make it impossible for defendants to unload their cargo in the manner provided by the charter-party. (3) That the winchers employed by the defendants were incompetent and incapable of delivering with such expedition as to enable the cargo to be discharged within the stipulated time.

The defendants' argument was addressed to four points:—(1) The meaning of "reporting day." (2) The effect of the men leaving work on December 24th, at 2 o'clock p.m. (3) Whether there was evidence to go to the jury as to improper stowage. (4) Whether there was evidence as to the incompetence of the winchers causing delay.

The "Ventura," then at New York, was chartered from the plaintiffs by Strauss & Co., of London, on September 18th, 1914, for a cargo of wheat, barley, or oats from Portland, Oregon, to several possible ports at charterers' option, calling *en route*, for final orders as to destination, at a Virginian coal port. Part of the intended cargo was alleged to have been sold by the shippers to defendants on September 22nd, but no such contract was proved, nor is there any evidence that any such contract was known to the captain, nor could it have altered duties under the charter-party or bill of lading, which reserved absolute freedom of action to the charterers. The loading was, according to the captain, made in pursuance of a rough diagram given to him by the shippers, from which the chief officer made a plan on October 19th. This plan was given in evidence, and showed the mode of loading of which defendants now complain. Its authenticity was not questioned by Mr. Brown in opening defendants' case, but Mr. FitzGibbon impugned it in reply. A copy was made for the ship and for the consignees, attached to the bills of lading. No evidence was given in contradiction of this by the defendants at the trial. The cargo consisted of blue stem wheat and white walla wheat, in nearly equal proportions, in sacks. The portion in respect of which the defendants were indorsees of two bills of lading came to about 3535 tons. The cargo having been loaded, bills of lading, which it must be taken were prepared by the charterers, were signed by the master on October 29th. The vessel left Portland on October 30th, and after calling at Norfolk, Virginia, for final orders, reached Queenstown on Sunday, December 20th, and reported at Customs on December 21st, representing that she was then lying at South Deep-Water Quay, Cork, which she could not reach, owing to the tide, till the following day. This acceleration of reporting day was under the advice of Horne, the ship's agent, in order to give the ship an advantage under clause 11 of the charter-party. The "Ventura" berthed on Tuesday, 22nd; and Marshall, the captain, notified the defendants of arrival, and that the Custom House reporting had been done the day before. The discharge began on the 23rd, and went on, Sundays and holidays excepted, till January 6th. A half-day was apparently lost on December 24th, owing to all hands leaving work. There was no evidence when the defendants became indorsees of the bills of lading. The Customs entry showed that the balance of the cargo was for Glasgow. The "Ventura" was equipped with steam-winches, which, if used, would have enabled the vessel, stowed as it was, to be discharged at the rate of 450 tons a day as specified in the charter-party. That would give the defendants just eight days as lay days. It is common case that in Cork, owing to labour combination, steam-winches cannot be used, but there is no evidence that this was known to the shipowners on September 18th. They accepted, on arrival, hand-winches for discharge, and cannot complain that delay was thereby caused.

As to the first question, "reporting day."—It was assumed, and is clear, that Queenstown was not within the commercial port of Cork, and that the "Ventura" was not an "arrived" vessel till December 22nd.

Clause 7 of the charter-party expressly defines lay days at the port of loading by reference to a written notice of readiness. Clause 11 does not use the term "lay days," but at Cork the discharge was to be at the average rate of 450 tons a day, Sundays and holidays excepted, "reporting day" not to count. The master, by clause 16, was required "to report" to charterers and their agents immediately on arrival at port of discharge, and enter the vessel at the Custom House in their name. Here "entry" follows "report." The holders of bills of lading were entitled to name the discharging dock, provided they did so as soon as arrival was notified by the master. Clause 17 prescribed the rate of demurrage, which, it is admitted, was, as regards figures, rightly computed. Under slip 1, attached to the charter-party, in the contingency therein stated, lay days were to count from forty-eight hours after arrival at a safe anchorage.

I am of opinion that the lay days began on December 23rd, and not on December 22nd. Clause 11 plainly deals with an arrived vessel, and puts reporting day in the same position as Sundays and holidays. If reporting day included a day before the vessel had arrived at the commercial port, and before the lay days could begin, it would have no effect whatever for the benefit of the charterers.

In any event, on the context, I am disposed to think that, if the day of Customs report was contemplated as the reporting day, such report was not to be made till the vessel had arrived at its business destination. If the captain failed to notify arrival, and thereby a day or more was lost, could it be contended that the charterers were liable for such time?

The second point—as to the men belonging to the ship and the merchants quitting work on December 24th at 2 o'clock—though opened by Mr. Brown, was not referred to by Mr. FitzGibbon in reply. It was not pleaded or proved, and is manifestly untenable. The self-given half-holiday taken by the employees was not such a holiday as the charter-party contemplates. *Budgett* v. *Binnington* (1) shows that the defendants could not get credit for this half-day. Mr. Brown courageously argued that the half-day should be debited against the ship, and that the discharge being prolonged to Monday, 4th, the defendants were entitled to the whole of that day, thus getting an extra half-day from the action of their employees.

I now turn to more difficult and important questions as to alleged negligent stowage, and incompetence of the winchmen.

Mr. Brown did not question Marshall's evidence as to the control of loading by the shippers, and as to the plan produced. His contention was (1) that Marshall had notice of the Cork consignment, and that no directions of shippers could affect the contractual rights of the holders of bills of lading; and (2) that the winchers were incompetent, and that there was evidence for the jury.

In reply Mr. FitzGibbon contended:—(1) That there was evidence that the stowage was unusual and improper in restricting the number of hatches to two. (2) That the acts of the shippers did not bind the defendants. (3) That a jury would be at liberty to find that the shippers gave no such directions as Marshall alleged. (4) That even if they did give such directions, the yellow slip proved in evidence showed that the shelter-deck was unappropriated, so that the captain ought to have stowed part of the defendants' lot there, which would have saved time. (5) That the winchers were inefficient.

The questions for the jury suggested at the trial were:—(1) Whether, under all the circumstances, it was improper stowage to stow cargo for two ports in such a way as to disable the ship from working more than two of the four hatches; (2) whether the ship prevented the consignee from taking delivery by the inefficiency of the winchers.

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(1) [1891] 1 Q. B. 35.

The first question is new, and of much legal and commercial importance. The delay in unloading was unusual. Apart from the non-use of the steam-winches (which is by consent excluded as a factor in the delay) the main cause of the delay was the inability to use more than two hatches; the depth of tank-hold No. 3; and the difficulty of getting the cargo from the wings. The use of hand-winches added to this difficulty.

What was the duty of the captain as to stowage? It was prescribed by clause 6 of the charter-party, and clause *c* in slip No. 1 attached, and the bill of lading, which reproduces the charter-party. He was bound to take reasonable care and skill in stowage. The complaint is that he was guilty of negligence in this respect.

The charter-party gave the charterers a number of options; the master could not control them, and his final orders were to be received at a calling port on his voyage. Until his bills of lading were signed, he was at the disposal of the charterers. The duty lay with them to prepare and submit the bills of lading: *Kruger's Case* (1). They were signed by the captain on October 29th, the loading being then completed.

Though the shippers doubtless then intended Cork to be the first port, they took bills of lading in a form which preserved all the options given by the charter-party. If they had already sold to consignees at Cork and at Glasgow, they could have limited the bills of lading accordingly and prescribed the specific voyages.

It is to be observed that, though a bill of lading as symbol of property may pass it, it may be only conditional in operation: *Mirabita* v. *The Imperial Ottoman Bank* (2); *Shepherd* v. *Harrison* (3). The shipper has the jus disponendi.

The charter-party and bills of lading together showed that the loading (as regards distribution) must have been controlled or indicated by the shippers, who, by the bills of lading, declined to be restricted to any particular ports or port of those allowed to the shippers.

(1) [1907] A.C. 272, at pp. 278, 279.

(2) 3 Ex. Div. 164, at p. 172.

(3) L. R. 5 H. L. 116.

I think that as to the arrangement of the cargo, that did not constitute negligence in stowage. The bill of lading in this case contemplates damage from physical injury. A distribution of the cargo which might cause delay if the shippers chose to send the cargo, or part of it, to one port or another, cannot be made negligent by the mode in which the shipper finally determines to act. The shippers owned the wheat which was put on board; it was to be stowed at once; the bills of lading, after the vessel is full, leave the ultimate destination uncertain. The situation before the captain was, that the shippers, in this bill of lading, informed him that they were not then prepared to give final orders as to the port or ports of discharge. The fact that by the use of steam winches the vessel could have been discharged in time but for labour restrictions (of which the captain is not shown to have been aware) would be a powerful argument against imputing negligence causing damage to the holders of the bills of lading.

If the captain stowed under the shippers' orders, the conclusion would appear certain. The shippers could do what they liked with their own, and had a jus disponendi after they took the bills of lading. *Ohrloff* v. *Briscall* (1) was wholly different; it related to material injury from the nature of the cargo. The Court declined expressly to decide the point as to the rights of indorsees on which Dr. Lushington gave an opinion. The view of Lord Esher in *Cox* v. *Bruce* (2) is apparently against Dr. Lushington's opinion. See also *Major* v. *White* (3). That a master should decline to carry out stowage ordered by the charterer would obviously put him in a difficult position. The charterer might be consigning to his agents, or might alter the ports or port, or when the bill of lading was signed it might be impossible to alter the loading. I assume, however (without deciding), that the ship would not be excused for damage caused to cargo by articles negligently stowed in dangerous proximity, though it would be more reasonable to hold the shipper liable where he ordered the stowage. But no case was cited at all resembling the present facts. The reasoning in *Ohrloff* v. *Briscall* (1) at pp. 239, 240 is against imputing negligence. If a charter was for two consecutive ports, and the loading was left to the ship, delay caused by neglect in not stowing the cargo so as to be promptly unloaded might be attributable to the ship; but that would be because the contract provided for the specific ports, and the shipper was free from responsibility.

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(1) L. R. 1 P. C. 231.

(2) 18 Q. B. D. 147, at p. 152.

(3) 7 C. & P. 41.

If Mr. FitzGibbon had intended at the trial to put to the jury the question whether the captain's evidence as to Strauss's directions was false, and the plan forged, he should have conveyed that to the judge, and asked for a specific question. No one, having regard to the course of the trial, would suppose that the form of question proposed was designed to comprehend any such grave charge. Mr. Brown made no such case. The captain was not cross-examined about it. No doubt, advised by Horne, he was guilty of sharp practice at Cork as to the Customs entry; but that would be quite insufficient to found a case that the plan attached to the bill of lading was not authentic. It obviously was genuine. It refers to Cork, and shows that Cork was looked on as a likely port of discharge, and that at that time a second port was contemplated. Marshall says he was not told the cargo was for Cork. He possibly means that he got no order to that effect. The plan mentions Cork at the top. Unquestionably the matter was at large till Norfolk, Virginia, was reached. An oral arrangement cannot, of course, alter the contract in the bill of lading, *e.g.*, as to voyages: *Leduc* v. *Ward* (1); but as to distribution of cargo of which the shipper is owner at the time of loading, that is a very different matter. There are many cases as to negligent stowage causing physical damage, such as *The Pearlmoor* (2) and *Baerselman* v. *Bailey* (3). The only cases as to arrangement of cargo causing delay that I have found give no help: *Porteus* v. *Watney* (4); *Leer* v. *Yates* (5). In the copious annals of commercial litigation there is no trace of such negligence as is suggested here being established in relation to a charter and bill of lading such as we have before us. The delay at Cork was owing to local labour restrictions.

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(1) 20 Q. B. D. 475.
(2) [1904] P. 286.
(3) [1895] 2 Q. B. 301.
(4) 3 Q. B. D. 534.
(5) 3 Taunt. 387.

If the captain's evidence was put aside, I should be of the same opinion. Some directions must have been given if the shippers reserved absolute power over the movements of the vessel. If steam-winches had been used, the unloading would have been effected within the lay days.

A further argument was ingeniously advanced that the shelter-deck shown on the yellow slip was not devoted to any particular part of the cargo, and should have been used for defendants' wheat. That point is met by the previous reasoning. If the shippers directed the stowage, it fails ; if they did not, the bill of lading left the disposition of the cargo at any port free.

I can discover no actionable negligence on the plaintiffs' part in stowing as they did, particularly as if steam-winches had been used, as they would be entitled to expect, the controversy would not have arisen. The custom of the port contemplated as regulating discharge, as was decided in *Clydesdale Shipowners Co.* v. *Gallagher* (1), does not interfere with the ship's internal arrangements. The onus of establishing negligence lay on the defendant. [His Lordship having discussed the alleged inefficiency of the winchers, held that that question should, on the facts, be decided against the defendants.]

The verdict will be reduced by one day's demurrage, £49 10*s*., and, as each party has been partially successful, there will be no costs of the motion and argument.

KENNY J :—

Of the three substantial questions proposed for our consideration, namely (1) reporting-day, (2) stowage, and (3) winchers, the only one in respect of which I entertained some little hesitation in coming to a conclusion was that concerning the winchers and the desirability of taking the opinion of the jury on the issue as to delay in the discharge of the vessel attributable to their inefficiency,—but I am convinced, on a careful reading of the oral evidence and the correspondence, that Dodd J. was right in holding that there was no evidence proper to be submitted to a jury of any such delay.

(1) [1907] 2 I. R. 578, 602, affirmed in H. L., [1908] 2 I. R. 482.

On the question of "reporting day" not counting in the number of lay days, the charter-party provides that the master is to report to charterers or their agents immediately on arrival of the vessel at port of discharge and enter the vessel at the Custom House in their name. The master was also bound pursuant to section 50 of the Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) to make due report of such ship to the Customs officer within twenty-four hours after arrival at any port of the United Kingdom, such report to be in the form prescribed in Schedule "B" to the Act. The charter-party, in a clause dealing with "Irish discharge," further provides that in the calculation of lay days "reporting day" is not to count. The question for determination is which of these reporting days is the day which on the true construction of the charter-party is the day that is not to count. What occurred was this. The vessel arrived at Queenstown—within the geographical limits of the port of Cork—on the evening of Sunday, the 20th December, 1914, but did not reach her discharging berth at South Deep-Water Quay, Cork, and was not prepared to allow discharge, until the morning of Tuesday, the 22nd December. In the meantime the master, accompanied by Mr. Horne, the ship's agent, proceeded on the Monday to Cork, and made his statutory report at the Custom House, in which report he stated, what was not the fact, that his ship was then lying at "South Deep-Water Quay." The ship's agent on the same date, the 21st, also caused a similar entry to be made in the books of the Cork Harbour Board; and on Tuesday, the 22nd December, the ship having arrived at the quay that morning, the master formally notified the defendants, as consignees of the cargo, that the vessel was moored in a discharging berth, ready to discharge, and that "reporting was done yesterday at the Custom House as per clause in charter-party, reporting day." The discharge of the ship commenced on Wednesday, the 23rd December. Now in these circumstances, what day was "reporting day" within the contemplation of the parties? The question involves the consideration of the extent of the port of Cork, and the determination of the period of time when the ship could be regarded as an arrived ship for the purpose of reporting either to the Customs or the consignees. So far as the limits and extent of the port are con-

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cerned, it is enough for the present purpose to say that they embrace Queenstown. No discharge was contemplated at Queenstown or at any part of the port of Cork save at Cork itself. So that though it could be said that the ship was within the geographical limits of the port from the time of her arrival at Queenstown on Sunday, the 20th, it is clear that she had not reached her discharging berth at Cork until Tuesday, the 22nd. When the parties used the expression "reporting day," to what report were they referring—that to the Customs or that to the consignees? Whichever day it was, its omission from the lay days was in the interest of the charterers and consignees, and presumably in order that the latter might be in a position to make their preparations for discharge of their portion of the cargo. To my mind this points to a report to the consignees and not to the Custom House. At the same time I think it not improbable that contemporaneous reports were in the minds of the parties to the charter-party, but I cannot believe that such a state of things was ever in their contemplation as would have the effect of deleting a lay day by rushing the Customs report before the ship was in a position to discharge. The vessel did not reach what is called in the case of the *Leonis* (1) the commercial area of the port until the 22nd December. Her destination was the port of Cork, in general terms. When did she become an arrival ship? She was brought by the Master to South Deep-Water Quay on the 22nd, in order that the discharge might take place at her berth there; and the discharge did accordingly take place at that berth. She was not ready to discharge until she arrived there, and, in the words of Kennedy L.J. in the *Leonis Case* (1)—"could not have been effectively placed at the disposal of the consignees of the cargo until such arrival." I cannot think that the parties intended that the benefit of the clause "reporting day not to count" could be defeated by the making of a report—whether made to the Customs or the consignees—on the day before the day of the ship's readiness to discharge. If such an event was contemplated, the benefit of the clause to the consignees might have been wholly lost by a report at any moment after the ship's arrival at any point within the geographical area of the port; and, according to the argument of the plaintiffs, it was lost by the making of a report when the vessel was at Queenstown.

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(1) [1908] 1 K. B. 499, at p. 520.

I am of opinion that what the parties intended, judging of that intention by the language of the charter-party and the circumstances of the case, was a report of the vessel to the consignees as an "arrived" vessel, and inasmuch as such report was not made until the 22nd December, the latter day is excluded from the number of lay days.

On the question of stowage the evidence is, in my judgment, overwhelming that the loading of the ship at Portland was carried out under the direct superintendence and direction of Strauss & Co., the charterers, and that they were responsible for the manner of stowage, which in effect confined the discharge of the defendants' part of the cargo to the two holds and the bunker hold, and consequently permitted the use of only two hatches. That restriction was the evident cause of the delay in the winching. The captain's uncontradicted evidence as to what took place at the loading port is explicit. He says: "I loaded absolutely at the orders of Strauss & Co. The cargo was put in by them. Messrs. Strauss gave me a rough diagram. The chief officer made this plan of the loading by direction of Strauss." The nature of the plan and of the manner of stowage is more fully explained in the letter of Horne & Co., the ship's agents, dated the 1st January, 1915, in which they point out that the arrangements by the shippers permitted delivery from only two hatches and the bunker hatch, instead of from all the hatches, and that a delivery from all the hatches could have been effected by the shippers arranging, when loading the cargo, for a clearance from the tops of at least four hatches. The statements contained in that letter have never been controverted, and they are confirmed by the evidence of Healy, the defendants' foreman. The defect in stowage relied upon cannot, therefore, in my judgment, be attributed to the plaintiffs.

The remaining point arises on the requisition by defendants' counsel at the trial that the judge should take the opinion of the jury as to whether the ship prevented the consignees from taking delivery by the inefficiency of the winchers who were employed by the ship for the clearance of the holds. As I have already said, I think there was some slight suggestion that these winchers were not physically the highest type of men producible in Cork, but I am satisfied they were the best that Doyle, the ship's stevedore, could procure. Thomas Healy, the defendants' stevedore, and Tracy, of the defendants' firm, admitted that Doyle got the best men that were to be had; and James Healy, the defendants' foreman, deposed that the sole cause of delay was the necessity of working with hand winches; that the slow progress was due to the depth of the hold; and that Doyle was doing his best to discharge the ship. If the winchers were of an inferior class, and the ship could have procured men better fitted for winching, it is significant that no complaint of inefficiency was made. That is admitted by defendants' foreman. In that state of facts, if on the issue of inefficiency of the winchers being the cause of the delay a verdict had been found for the defendants, it could not in my opinion have been sustained, and the learned judge was right in his determination that there was no evidence of delay under this head proper to be submitted to the jury.

I concur with my brother Gibson in the form of order which he proposes.

Solicitors for the plaintiffs: *A. H. Allen & Sons.*
Solicitors for the defendants: *John & James Foley.*

C. L.

In the GOODS of MOXLEY (1).

K. B. Div.
Probate.
1916.
Mar. 8.

Probate — Practice — Application to impound a Grant when made to the Executor—Injunction.

The King's Bench Division, in the exercise of its probate jurisdiction, will not make an order directing that a grant of probate to an executor shall be impounded when made, nor will it grant an injunction restraining an executor named in a will from dealing with the assets after a grant has been made, even though it is stated that the assets will be in jeopardy if a grant of probate is made to the executor.

The proper remedy is to issue a writ in the Chancery Division for the administration of the estate, and immediately to apply—ex parte if necessary—for an injunction and a receiver.

Motion on Notice.

Richard Moxley, the deceased in this matter, died on the 13th February, 1916, leaving a will dated the 16th December, 1915, whereof he appointed Robert Stanton and John Hegarty executors. The deceased left the licensed house known as "The Anglers' Rest," of which the estimated saleable value was £1,500, and also money on deposit receipt in several banks, and other personal estate, to the value of about £4,400. Robert Stanton, one of the executors named in the will, was believed to be dead, having been reported from the Dardanelles to be "wounded and missing," in August, 1915. Besides a widow, the deceased left two infant children, Richard and Joseph Moxley, aged respectively twelve and ten years. Richard and Joseph Moxley were beneficiaries under the will, and the widow, Ellen Moxley, was entitled to maintenance and residence in the deceased's house.

The applicant, Ellen Moxley, widow of the deceased, instituted the present motion, whereby she applied "for an order that the grant of probate, application for which is being made by John Hegarty, surviving executor of the will of the above deceased, be impounded, pending the institution of proceedings before the

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(1) Before O'Connor M.R.

Lord Chancellor to have Richard Moxley and Joseph Moxley, minor children of the above-named deceased, made wards of Court, and for directions of the Court as to the administration of the estate of the above deceased in Court."

In support of the motion the applicant filed an affidavit in which she stated that John Hegarty, the surviving executor, was not a fit and proper person to be entrusted with the assets, on the grounds that his means were very small; that he himself was a man of doubtful reputation and character, not fit to be entrusted with the assets; and that he had threatened to sell the lands and licensed premises. These allegations were denied by Hegarty in an affidavit filed by him.

The motion was heard by O'Connor M.R., sitting to hear motions in the King's Bench Division (Probate).

Norwood K.C. (with him, *Hungerford*) for the applicant:—

The Court has jurisdiction to make the order asked for: Maxwell's Probate Practice, p. 191. In the alternative I ask for an injunction restraining the executor from dealing with the assets, which is in accordance with English probate practice: *In re Parker* (1); *In the Goods of Moore* (2).

Herbert Wilson K.C., for the executor:—

The Court has no jurisdiction to make the order asked for here. Even if it had, it could only exercise that jurisdiction in the same way as a judge of the Chancery Division exercises his jurisdiction in appointing a receiver in a chancery action against an executor: *Middleton* v. *Dodswell* (3). In that case, Lord Erskine C., at pp. 268 and 269, says: "The administration is therefore not upon slight grounds to be taken from an executor. . . . To induce the Court to interfere, especially before answer, a strong, special ground must be made. . . . I ground the order upon this; that there is, what may be considered, though perhaps not the strongest way of expressing it, an affidavit that the property is in danger from insolvency, existing or expected, by which only it can be in danger." [He also cited *Hathornthwaite* v. *Russel* (1), and referred to Daniel's Chancery Practice, 7th ed., p. 1415, and Williams on Executors, 10th ed., p. 1615.]

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(1) 54 L. J. (N.S.) Ch. 694.

(2) 13 P. D. 36.

(3) 13 Ves. 266.

O'Connor M.R. :—

I am not satisfied that I have jurisdiction to make the order asked for. There is no precedent for it. Mr. Norwood, as an alternative, asks for an injunction to restrain the executor from dealing with the assets, and refers to the English cases of *In re Parker* (2), and *In the Goods of Moore* (3). Those are cases in which the Court granted an injunction restraining an executor named in a will from dealing with the assets until he had obtained a grant of probate; but they do not extend to dealings with the assets after a grant has been made. To grant an injunction generally, as asked for by Mr. Norwood, would be to introduce a new practice. The proper course for the applicant to adopt is to issue a writ in the Chancery Division for the administration of the estate, and immediately to apply—ex parte if necessary—for an injunction and a receiver and manager. I refuse this motion, with liberty to each party to apply, in any administration action which may be instituted, for the costs of the present application.

Solicitors for the applicant: *Babington & Clarke.*
Solicitors for the executor: *John Stanton & Sons.*

T. C. T.

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(1) 2 Atk. 126.
(2) 54 L. J. (N.S.) Ch. 694.
(3) 13 P. D. 36.

K. B. Div.
1915.
Nov. 16, 22.

OLIVER O'CONNOR *v.* CATHERINE O'CONNOR AND OTHERS (1).

Landlord and Tenant—Agreement fixing Fair Rent filed with Land Commission—Non-agricultural Holding—Estoppel—Expiration of Statutory Term—Notice to Quit—Land Law (Ireland) Act, 1881 (44 *&* 45 *Vict.* c. 49), *s.* 8, *sub-s.* 6—*Land Law (Ireland) Act,* 1896 (59 *&* 60 *Vict. c.* 47), *s.* 3, *sub-sec.* 1.

In the year 1884 an agreement and declaration fixing a fair rent, made between the landlord and tenant of a holding, was filed in the Irish Land Commission Court pursuant to s. 8 of the Land Law (Ireland) Act, 1881. At the time of the filing of the agreement the holding was not agricultural or pastoral, or partly agricultural and partly pastoral, within the meaning of the Act. There had been no further fixing of a fair rent. A successor in title of the landlord brought an ejectment founded on notice to quit to recover possession of the holding.

Held, that the agreement and declaration precluded the landlord and his successors in title from objecting that the holding was not at the time agricultural or pastoral, or partly agricultural and partly pastoral; and that, although the statutory term had expired, the tenant was protected by s. 3 of the Land Law (Ireland) Act, 1896, from having the tenancy determined by notice to quit.

CASE STATED for the opinion of the King's Bench Division by Boyd J. on the hearing of a civil-bill appeal.

The case set out as follows:—

"The plaintiff claimed by an ejectment founded on a notice to quit to recover possession of part of the lands of Rathnagussane, containing 2A. 2R. 14P., held by the defendant Catherine O'Connor as yearly tenant. The notice to quit was admitted to be sufficient to determine the tenancy, if by law determinable. The tenancy was an old one, in existence long before 1881. The holding consisted of lands in the village of Kilmovee, and on it were three inhabited cottages occupied by undertenants of Catherine O'Connor, named in the ejectment, and a bootmaker's shop occupied by another undertenant, and a publichouse held by Maria O'Connor, who claimed same as a freehold as against Catherine O'Connor. No evidence was given in support of any such claim. There were ruins of two other cottages, inhabited in 1883, and of a mill on the holding. All said cottages but one had gardens attached. In 1883 Mrs. L. M. Gibbon was the landlady, and Catherine O'Connor was tenant of the holding at a yearly rent of £4, and on the 18th day of December, 1883, an agreement and declaration fixing a fair rent on the holding of Catherine O'Connor of £3 4*s*. was signed by said L. M. Gibbon and said Catherine O'Connor, purporting to be pursuant to sect. 8 of the Land Law (Ireland) Act, 1881, and duly filed in the Irish Land Commission on the 21st day of March, 1884. A certified copy of the agreement and declaration (County Mayo No. 3047) is to be deemed incorporated herewith, the land being therein described as Rathnagissane. I find, as a fact, so far as the said agreement leaves it open to me to do so, that at the time of the filing of the said agreement the said holding was not agricultural or pastoral, or partly agricultural or pastoral, within the meaning of the Land Law (Ireland) Act, 1881.

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(1) Before GIBSON and KENNY JJ.

"The Congested Districts Board recently acquired the estate of said L. M. Gibbon, and, in consideration of a cash payment by plaintiff, sold to him the lands comprised in the tenancy of Catherine O'Connor, to whom he thus became landlord. The plaintiff was registered pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner of the lands, and the conveyance to him and certified copy of the folio and map under said Act are to be deemed incorporated herewith. There has been no further fixing of a fair rent than that by the filing of the agreement and declaration of the 18th December, 1883. The defendant Catherine O'Connor, who is the mother of the plaintiff, did not defend the ejectment, and notice was served on the defendants, other than Maria O'Connor, that it was not proposed to disturb their tenancies, and they did not defend. An original or copy of such notice is to be deemed incorporated herewith. Maria O'Connor entered a defence, and the county court judge dismissed the ejectment. Maria O'Connor relied on the statutory rights arising under the Land Law (Ireland) Acts, and the Local Registration of Title Act, from the said agreement and declaration, as a defence to the ejectment. The plaintiff contended that the holding was not agricultural or pastoral or one on which a fair rent could have been fixed, and that even if it could, the statutory term had expired, and that under his title above set out he was entitled to recover possession of the holding. It was agreed by both parties that I should state this case for the opinion of the King's Bench Division. The question for the Court being, whether the plaintiff is entitled to a decree for possession; if he is, the dismiss is to be reversed and a decree granted with costs and £2 witnesses' expenses; if not, the decree is to be affirmed with costs and £2 witnesses' expenses. The Court shall be at liberty to draw all inferences of fact."

Price (with him *Arthur Meredith K.C.*), for the plaintiff:—

Sect. 8 (sub-s. 6) of the Land Law Ireland Act, 1881, is the section giving power to a landlord and tenant to fix a rent by agreement. An agreement under that section could only be made with reference to a holding to which the Land Acts applied. "Such" agreement when filed operates to create a statutory term and restrain the common law right to serve a notice to quit. In the present case the holding was not in fact a holding to which the Acts applied. No consent could make it a holding to which the Acts applied, and the agreement, therefore, does not come within sect. 8, sub-s. 6.

In *Ex parte Johnston* (1) it was decided that the Land Commission had jurisdiction to decide in point of fact whether or not a holding came within their jurisdiction, and that their finding could not be questioned; but that was under sect. 37, giving the Land Commission such power in case of dispute between landlord and tenant. No such power exists where there is no dispute. The holding must be in fact within the jurisdiction for sect. 8, sub-s. 6, to have anything to operate upon.

Assuming that the agreement fixing a fair rent operated to create a statutory term, the statutory term has now expired. The restraint upon serving a notice to quit imposed by section 5 of the Land Law Act, 1881, only lasted during a statutory term.

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(1) 14 L. R. Ir. 80.

Sect. 3 of the Land Act of 1896 continued the tenancy after the expiration of the statutory term, subject to the same conditions. The restriction on serving a notice to quit was not a condition of the tenancy. If it were a condition of the tenancy, the restriction was limited to the duration of the statutory term which has now expired.

Fitzgerald Kenny and *Fetherstonhaugh K.C.*, for the defendant Maria O'Connor:—

The agreement fixing a fair rent, duly filed, is conclusive against plaintiff's right to serve a notice to quit. All the incidents of a statutory term, save the right of either landlord or tenant to apply for a second term rent, are preserved by sect. 3 of the Land Act of 1896 on the expiration of the fifteen years. Freedom from a notice to quit is one of the statutory conditions preserved by this section. The agreement, when filed, has the same effect as an order made in Court. No objections to the nature of the holding, *e.g.*, that it was in fact a future tenancy or a town park, could be taken on a second-term application. Here the real objection that could have been taken was that the tenant was not in occupation, not that the holding was non-agricultural. The fact of part of the holding consisting of houses in a village does not make the holding non-agricultural: *Campbell* v. *Gillespie* (1). In *Moore* v. *M'Clintock* (2) the reason for holding the agreement not an estoppel was that the agreement was not filed. Once landlord and tenant agree to fix a fair rent, and the agreement is duly filed, no matter how entirely the holding was outside the Land Acts, there is an estoppel. Here the landlord, though he believed that a fair rent could not be fixed if he opposed, may have preferred to avoid the expense of litigation in connexion with so small a holding, and agreed that the holding was one within the Acts. The plaintiff, claiming under the landlord, is estopped by the filed agreement, and the effect of sect. 8, sub-s. 6, of the Land Act, 1881. [They also referred to sect. 5, sub-s. 4, and s. 18, of the Land Law (Ireland) Act, 1896.]

Meredith K.C., in reply.

Cur. adv. vult.

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(1) 4 N. I. J. R. 214.

(2) [1907] 1 I. R. 180.

K. B. Div. 1915. O'CONNOR v. O'CONNOR. Nov. 22.

GIBSON J.:—

Of the two questions for decision, the first is of capital importance to all holding under statutory agreements filed under sect. 8, sub-s. 6, of the Act of 1881. If the plaintiff's contention were correct, such tenants would be exposed to the danger of having the agreement invalidated by a subsequent decision in a collateral proceeding, notwithstanding that the original parties were not before the Court, and that the agreement had been filed and acted on for years—here thirty-two years—as governing the status and rights of the contracting parties.

This first question is:—Does an agreement and declaration purporting to be made under sect. 8, sub-s. 6, if regular on its face, and duly filed, preclude the landlord and his successors from objecting that the holding was not at the time agricultural or pastoral in character, or partly agricultural and partly pastoral?

The second question is:—When the statutory term expires, does sect. 3 of the Act of 1896, c. 47, protect against notice to quit in the same way as if the term had continued and was in force?

The agreement in controversy was dated the 18th December, 1883, and filed on the 21st March, 1884. Mrs. Gibbon was the landlord, and was presumably owner in fee. Catherine O'Connor was the tenant. The holding consisted of 2A. 2R. 14P., and represented admittedly a present tenancy; but my brother Boyd has found as a fact that at the time of the agreement the holding, as described in the case stated, was not agricultural or pastoral, or partly agricultural and pastoral. His conclusion of fact in 1915 may not be the view that the parties took in 1883, when the law was unsettled; and it may well be that by way of compromise, to avoid useless expense in law costs about a petty holding, the landlord admitted the tenant's right to a judicial rent. The owner's estate was afterwards acquired by the Congested Districts Board, and was by them sold to the plaintiff, the tenant's son, and notice to quit was served by him, which would be effectual to determine the tenancy if the agreement of 1883 was invalid. The object of the notice was to get rid of Maria O'Connor, who alone resists the ejectment, and who appears to hold a part of the premises not under, but adversely to, the tenant. The statutory term was never renewed.

Apart from statute law, an owner in fee, which Mrs. Gibbon was, could make any bargain he liked with his tenant, and an agreement embodying in express language the various terms and conditions found in sect. 5 of the Act of 1881 would have been a legal contract. Since the statute of 1881, a present tenant of a holding of small valuation within the Act, whatever may have been the form of agreement with the landlord, was entitled to have a judicial rent fixed, and he could not contract himself out of such right. But there is no corresponding provision fettering the landlord and prohibiting him from contracting himself out of the special exception provisions contained in sect. 58 of the Act of 1881, and sect. 59 of the Act of 1896. In matters of contract or property where public policy or statutory prohibition does not prevent, the general rule is one *renuntiare potest juri pro se introducto.* Some of the exclusions in sect. 58 seem clearly waivable, and it is not easy to see why all may not be in the same position. If estoppel may be used as a defence by a purchaser or a tenant against a landlord alleging that the holding on which a judicial rent was fixed was not one to which the Act applied, is not express contract by an absolute owner equally efficacious? Why should not an absolute owner be at liberty to make a conclusive admission of the tenant's status and right in a doubtful case to avoid litigation? The present case is one of this type. It is not one where the landlord with his eyes open gave the tenant a status to which she manifestly was not entitled—if that circumstance could make any difference.

The argument for the plaintiff is that in sect. 8, sub-s. 6, the existence of a present tenancy to which the Act applies is an inflexible condition precedent to the validity of a statutory agreement and declaration, and that only "such" agreement, complying with such condition-on filing, possesses the effect of a judicial rent fixed by the Court under the provisions of the Act. In this point of view the prescribed tenancy must exist as an objective fact before and at the time of the agreement; the parties cannot, by compromise or otherwise, alter or waive the exceptions and limitations found in the statute.

I. On this first question, two matters have to be considered:—(1) the effect of the Act of 1881; (2) the effect of the Act of 1896.

As to the statute of 1881, *Johnston's Case* (1) was pressed as deciding (*a*) that a present tenancy to which the Act applies was prima facie a condition of a collateral character, and that, if sect. 8 stood alone, the non-existence of that condition would be fatal to jurisdiction; (*b*) that extended jurisdiction only arose out of sect. 37, sub-s. 5, which contemplated adjudications in Court, and not agreements out of Court. I am unable to take this view of that well-known case. The proceeding related to a judicial rent fixed under sect. 8, sub-s. 1; it was against the tenant; the Court had not to consider the effect of contract, estoppel, or waiver. Whether sect. 8, sub-s. 1 (which uses the same description as to tenancy that occurs in sub-s. 6), read by itself, would create a collateral condition, or merely described a matter which the Court was to determine (as in *Reg.* v. *Tipperary Justices* (2); *Williams* v. *Adams* (3)), was not decided, and the point was assumed for the purpose of the judgment. I express no opinion on it. The judgment of the Court was not rested exclusively on sect. 37, sub-s. 5. Sect. 48, also relied on, would appear to me still stronger. The Land Commission was thereby given full power to determine all matters, whether of law or fact; it was not subject to be restrained, or exposed to certiorari; and it could state a case on any matter of law. Such case would include the applicability of sect. 58 and other provisions, and assumes that the Land Commission had jurisdiction to decide in the first instance the matters involved in such case. The Act of 1887, sect. 9, demonstrates this in the case of town parks.

I turn to the statute itself. There were various classes of present tenancies. They are enumerated in my judgment in *Cope* v. *Gabbett* (4). For the purpose in hand, judicial rents may be taken as—(1) fixed by contract under section 8, sub-section 6; (2) by arbitration under section 40, the award of the arbitration Court being enforceable as if an order of the civil-bill court; (3) where the parties failed to agree, by order of the civil-bill court or Land Commission under section 8, sub-section 1. The definition of judicial rent in section 48 of the Act of 1896 makes no distinction between these different classes.

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(1) 14 L. R. Ir. 80.

(2) 12 L. R. Ir. 393.

(3) 2 B. & S. 312.

(4) [1904] 2 I. R., at p. 244.

It is admitted that a Court order fixing a judicial rent would be unimpeachable. Such order might be made on consent, and might represent an agreement out of Court. There might be no dispute; the Court might know nothing of the facts; and the order might represent no real decision. What can be done in Court by order, can equally be carried out by agreement out of Court, where the parties are competent and the agreement in statutory form is duly filed. To get security the parties are not compelled to resort at unnecessary cost to formal Court procedure. The filing of the statutory agreement and declaration brings the transaction within the jurisdiction of the Land Commission. Rules 143, 144, and 145 are in point on this question. If an application by a landlord under Rule 143 was served on any such ground of objection as is here relied on, would not the decision of the Court be on a matter in dispute? Could such decision be challenged in a collateral proceeding? So long as the apparently valid statutory agreement remains on the file unimpeachable, it must be regarded as an effectual Court document regulating rights in the same way as an order.

It was urged that a judicial rent operated *in rem*, and that though such effect might be given to an adjudication, it could not be possessed by an agreement unless it strictly complied with the statutory description of tenancy. This is a mistake. The judicial rent does not operate *in rem*; that is, against all the world. Whether created by order or agreement, it could be impeached: *Massy* v. *Norse* (1); *Peyton* v. *Gilmartin* (2); *Cope* v. *Gabbett* (3).

The Act of 1896, section 17, guards future agreements made under that section against the possibility of such an argument as the plaintiff here advances, as sub-section 3 gives the special agreement, on being filed, the same effect as if the matters agreed on had been determined by the Land Commission, and the Land Commission had power to determine the same. The provision was not alluded to in argument. I do not think that, whether it was introduced *ex abundanti cautela*, or otherwise, it can be interpreted as leaving statutory agreements under section 8, sub-section 6, obnoxious to objections from which these new special agreements of minor importance were exempt. It cannot alter the construction of the Act of 1881 regulating statutory agreements as a whole.

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(1) 20 L. R. Ir. 464.

(2) 28 L. R. Ir. 378.

(3) [1904] 2 I. R. 234.

I next take up the Act of 1896. Under section 3, where there has been a statutory term, and such term has expired, if an application for a new statutory term is made, no objection which could have been taken upon the application for a previous judicial rent shall be allowed. Mr. Meredith contends that this contemplates an application in Court. The section in the earlier part does not say how the statutory term is created. It plainly includes statutory terms by agreement as well as by order, and if the parties agreed as to the second term, no application would be necessary. But the definition of judicial rent is decisive. Application to fix a fair rent under section 48 is made to include an agreement to fix a fair rent. I do not think that section 5, sub-section 4, gives assistance on either side. The agreement of 1883 was governed by the Act of 1881, and the partial repeal of section 58 does not alter the rights of the parties: Interpretation Act, 1889, section 38. Section 5, sub-section 4, only keeps previous judicial rents out of the altered and extended provisions enacted by section 5. It is on the same lines as section 3: *Campbell* v. *Gillespie* (1). Section 10, as to limited owners and tenancies created by them, shows the desire of the Legislature to give increased security and certainty to tenants who by previous decisions would have been unable to rely on statutory rights. Section 18 was pressed by defendant's counsel as conclusive in their favour. It deals with landlord's consent given prior to the commencement of the Act, and enacts that a tenancy where the described consent has been given shall be deemed a present tenancy. It is silent as to such tenancy being one to which the Act is to be deemed to apply. Where an agreement under section 8, sub-section 6, was duly filed, I do not think that this provision was necessary, at least in case of an absolute owner free to make his own contract. The section shows an anxiety to better the position of the tenant, but I express no opinion upon its general effect or its application to the present controversy if the agreement had not been filed.

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(1) 4 N. I. J. R. 214.

The danger of allowing a deliberate contract made between competent parties, on the faith of which money may have been spent, to be annulled on a view of facts taken in a collateral proceeding between different parties, a generation later, is manifest. At this distance of time every inference ought to be drawn to support the agreement which has remained on the file of the Court as an unquestioned instrument of title. Unquestionably a purchaser from the tenant could rely on estoppel. The tenant is entitled equally to bind the fee-simple owner by his admission of the tenant's status, relying on which he accepted a statutory term giving the landlord rights, and imposing on the tenant obligations, not existing before. The agreement may represent a compromise, a well-known form of valuable consideration, or it may proceed on what was then supposed to be the law. So long as it remains on the file it binds the parties. Some of the estoppel decisions relate to controversies between the landlord and tenant: Cherry, ed. 1903, pp. 357, 523.

Mr. Fetherstonhaugh said that he understood the case was to be stated as to occupation, not as to the nature of the holding. The case appears confined to this latter point, though it reserves power to draw inferences of fact. Occupation depending on landlord's consent to sub-letting was evidently a matter of waiver or consent.

II. Assuming that the agreement so filed was valid, and created an effectual statutory term, sect. 3 of the Act of 1896 disabled the plaintiff from serving notice to quit, there not having been any breach of statutory or other conditions. Under sect. 5 of the Act of 1881 a tenant could not be compelled to quit his holding save in consequence of a breach of a statutory condition, and the landlord was given a limited power of resumption. The section continues the present tenancy after the expiration of the statutory term subject to the same rent and conditions (including the statutory condition) till the tenancy is determined or a new statutory term created. The statutory conditions give the landlord rights which he would not otherwise possess. It could not have been contended that a tenant, bound by and observing the prescribed conditions, should be outside the protection given by sect. 5, and be exposed to a notice to quit which he could make abortive, if an ejectment was brought, by an application under sect. 13, both parties being thus forced to incur meaningless expenses.

The question put in this case will be answered in the negative.

KENNY J.:—

In this case we are asked, after a lapse of thirty-two years, to say that a fair rent of a holding fixed by agreement in the year 1883 was inoperative under the Irish Land Acts. The ground for the plaintiff's contention is that the holding has now been ascertained by the finding of fact in the "case stated" to have been neither agricultural nor pastoral in character when the agreement was entered into, and therefore outside the purview of the Land Acts. The plaintiff's claim is not one that recommends itself on the merits to very favourable consideration, in view of the circumstance that it involves the repudiation of a very solemn agreement entered into by his predecessor in title, and acted on for a great number of years.

Two questions were discussed, the first being whether, notwithstanding the aforesaid finding of fact by the learned judge who stated this case, a good tenancy under the Land Acts could be deemed to have been created between the landlord and the tenant—the defendant Catherine O'Connor; and the second being whether, assuming such a tenancy, it was competent to the landlord to determine it by notice to quit so long as a second term had not been fixed.

The finding of fact by my brother Boyd is a somewhat qualified one. It is not an absolute finding that the holding was one not within the Land Acts at the time of the filing of the agreement, but merely that "so far as the agreement leaves it open," it was outside of the Act of 1881. That finding, to my mind, means only this—that in its essence the holding was outside of the Land Acts, but that the agreement may have brought it within them. My brother Boyd leaves it quite open for us to say what effect the execution and filing of the agreement of 1883 had upon such a holding.

It is admitted that if in a contentious proceeding between the landlord and tenant the Court had fixed the fair rent under sect. 8,

K. B. Div.
1915.
O'CONNOR
v.
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Kenny J.

sub-sect. 1, of the Act of 1881, the landlord and his assignees would be precluded from afterwards questioning the status of the tenant. The power of fixing a fair rent by agreement is contained in the same section, the 8th, and nothing can be plainer than the concluding sentence of sub-section 6 (confirmed by the definition of judicial rent in the Act of 1896), which declares that such an agreement when filed "shall have the same effect and consequences in all respects as if the rent so agreed on were a judicial rent fixed by the Court." Both methods of fixing a fair rent are dependent on the tenancy being a present tenancy in a holding to which the Act applies. There is no question of fraud, or of attempted evasion of the provisions of the Land Acts, suggested in connexion with the agreement of 1883. The first sub-section of the 8th section contemplates in express language a failure on the part of the landlord and tenant to come to an agreement as to the amount of the rent, and in such a case supplies the remedy in the shape of a contentious application to the Court. In the present case there may, for aught I know, have been an initial dispute between the parties as to the amount of the fair rent, or as to the status of the tenant. If such a dispute existed and the parties had gone into Court, both questions would have been finally disposed of; but if such a dispute existed, they—I should think wisely—came to an agreement under sub-section 6 which enabled them to give the rent under such an agreement all the cogency and effect of a judicially fixed rent. So long as there is no fraud or imposition, I am unable to see why, in a doubtful case, the parties could not effectually agree both as to rent and status, and it would be a case of extreme hardship if, after possible dealings with the holding on the basis of the agreement being effective—after the rent fixed by the agreement had been paid during all these years—the assignees of the original landlord were to be allowed to raise a question which his predecessor in title apparently never thought of. I therefore think that on the first point the plaintiff fails.

On the other point, I am also of opinion that our decision must be in favour of the defendant. The Act of 1881 did not abolish notices to quit; but in order to make a notice to quit effectual for the determination of a tenancy, the landlord must take proceedings to enforce it, and proceed to judgment and recovery of possession: *Haren* v. *Archdale* (1); *Montgomery* v. *O'Hara* (2). The proceedings to enforce the notice to quit might be postponed or suspended if the tenant made application to the Court under the provisions of section 13, sub-section 3, of the Act of 1881; but pending the fixing of a judicial rent, whether for a first term, or any succeeding term, it was possible, so long as section 13 was not invoked, to render the service of a notice to quit operative for the determination of the tenancy. But the Land Act of 1896, in my opinion, has corrected this; and by the 3rd section has prolonged the security afforded to a tenant during a statutory term by the 5th section of the Act of 1881. By the 3rd section, on the expiration of a statutory term in a present tenancy, the tenancy is to continue a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term, until the tenancy is determined, or a new statutory term for the holding begins. The Act of 1881 had made no provision for the rights and obligations of a tenant in the period intervening between the termination of a statutory term and the commencement of another, save such as was afforded by the 13th section. The 3rd section of the Act of 1896 deals specifically with that period, and, in my opinion, gives the like protection to a tenant at the end of a statutory term as he enjoyed during the term. By the 5th section of the Act of 1881 the tenant could not, during the statutory term, be compelled to quit his holding except for breach of some one or other of the statutory conditions. The Act of 1896 places him at the end of his term, and until a new term commences, in the same position as he was during the term. He could not have been compelled to quit during the term unless for breach of a statutory condition. Neither can he, in my opinion, be compelled to quit at its termination.

I therefore agree with my brother Gibson that the plaintiff is not entitled to a decree for possession. If we decided that he was so entitled, I think we should be offending against, and indeed defeating, the main principle of the Land Acts, which has for its object the security of the tenant's tenure.

Solicitor for the plaintiff: *John Garvey.*

Solicitor for the defendant: *Patrick O'Connor.*

A. E. C.

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(1) 12 L. R. Ir. 306; 14 L. R. Ir. 296. (2) 22 L. R. Ir. 608; 24 I. L. T. R. 2.

THE GOVERNORS AND COMPANY OF THE BANK OF IRELAND *v.* PATRICK MMANAMY AND OTHERS (1).

K. B. Div.
1915.
Nov. 8, 9, 23.

Contract—Guarantee—Defence of non est factum*—Honest belief, without negligence, that Document was of different Nature—Belief not induced by Fraud.*

The defendants signed a document purporting to be a guarantee, in the honest belief that it was a document of a wholly different nature, the mistake not being due to any negligence on their part.

Held, that they were not bound by the document, although there was no evidence that their signatures had been obtained by fraud.

MOTION to set aside judgment entered for the defendants John Morris, John Breheny, James Fuery, James O'Gara, Michael Brennan, Peter Handberry, Michael Neary, James Moran, Timothy Devany, John Shanley, John Muldoon, Bartley McDermott, John Kennedy, Charles Bruen, Andrew Daly, William Lytle, Michael Feely, Matthew Beirne, Patrick McCrann, Bartley Regan, Thomas Beirne, John McKeown, and Joseph Beirne, and for a new trial.

The plaintiffs, by specially endorsed writ, sued thirty-eight defendants, including those above named, for the sum of £1034 15*s.* 10*d.* and interest "on foot of a letter of guarantee, dated the 7th April, 1911, whereby the defendants and James H. Murphy, Andrew McElroy, Carmac Cox, Michael McDermott, Thomas Sheill, Michael Cunningham, Thomas Gard, and John McKeown jointly and severally guaranteed to the plaintiffs all debts, liabilities, and engagements of the Boyle Co-operative Agricultural and Dairy Society, Limited, to the plaintiffs to the extent of £1000, with interest at 5 per cent. per annum from date of demand.

Twenty-four of the defendants sued, namely, John Morris, John Breheny, James O'Gara, Michael Brennan, Peter Handberry, Michael Neary, James Moran, Timothy Devany, John Shanley,

(1) Before CHERRY L.C.J. and BOYD J.

John Muldoon, Thomas Connaughton, Bartley McDermott, John Kennedy, William Healy, Charles Bruen, Andrew Daly, William Lytle, Michael Feely, Matthew Beirne, Patrick McCrann, Bartley Regan, Thomas Beirne, John McKeown, and Joseph Beirne, put in a defence to the plaintiffs' claim. The material portions of the defence were as follows:—"4. Admitting, for the purposes of this defence, but not further or otherwise, that the defendants signed the document alleged by the plaintiffs to be a guarantee, the defendants say that the said document was signed by them, and each of them, on the false representation made by the plaintiffs' agent, Daniel Ahern, that same was (*a*) as regards the defendant Patrick McCrann, a receipt for a dividend of one shilling in respect of shares held by the said Patrick McCrann in the said society; (*b*) as regards the defendant Joseph Beirne, a receipt for money paid to the said Joseph Beirne for milk supplied by him to the said society; (*c*) as regards the defendant John Kennedy, a guarantee for manures for Breedogue Auxiliary Society; (*d*) as regards the other defendants, a book or other paper to enable them to receive manures or other goods from the said society, and that the said document was so signed by them and each of them under a total mistake as to its nature and in the bona fide belief that they were executing an instrument of a wholly different kind from that which the plaintiffs now allege. 5. The defendants were induced to make and give the guarantee alleged in the statement of claim by the fraud of the plaintiffs' agent, Daniel Ahern. Particulars of the fraud are as follows:—In order to induce the defendants and each of them to make and give the alleged guarantee, the plaintiffs' agent verbally represented to the respective defendants falsely and fraudulently at the time they signed the said guarantee that they were in fact signing (*a*) in the case of the defendant Patrick McCrann, a receipt for a dividend of one shilling in respect of shares held by the said Patrick McCrann in the said society; (*b*) in the case of the defendant Joseph Beirne, a receipt for money paid to the said Joseph Beirne for milk supplied by him to the said society; (*c*) in the case of the defendant John Kennedy, a guarantee for manures for Breedogue Auxiliary Society; (*d*) in the case of the other defendants, a book or other document to enable them to receive manures or other goods from the said society. Acting on and believing the said fraudulent misrepresentation of the plaintiffs' agent, the defendants signed the document sued upon, believing same to be a document of a wholly different kind as set out aforesaid."

The action was tried before Madden J. and a special jury of the county of the city of Dublin on the 23rd, 24th, and 25th of June, 1915. The following are the material extracts from the judge's report:—

"Thomas G. Thorpe examined: 'I was agent for the plaintiffs from March, 1911, to April, 1915. There was an existing guarantee to the bank from the society for £500; that was signed by the defendant William Healy. An application was made to increase the overdraft to £1000; that was submitted to the office in Dublin, and a form of guarantee was sent down. It was handed to Ahern to witness the signatures of the guarantors. He was manager of the Creamery, and not in any way connected with the bank. In February, 1912, eight names were attached to the guarantee; it was sent back for further signatures, and was relodged before April 16th, 1912. It was re-lodged on the 19th April with nineteen names, and sent by me to the head office. The bank was not satisfied with nineteen, and returned the guarantee to me. By the 10th May, 1913, the guarantee was signed with forty-three names. None of these was witnessed by me. On the 15th May the society was noticed to put the account in proper order. In January, 1914, a couple of additional names were signed. On the 2nd April, 1914, a circular was sent to all the guarantors, and on the 9th May I demanded payment from the guarantors. On the 28th January, 1914, the account was ruled off. There was £1072 14*s.* 9*d.* debit on current account, and £1034 15*s.* 10*d.* due on the guarantee when the writ was issued. The defendants Matthew Beirne, Charles Bruen, Joseph Beirne, Luke Carey, Andrew Daly, Michael Foley, James Fuery, William Lytle, John Muldoon, John Morris, James Moran, Patrick McCrann, John McKeown, and John Shanley attended after they got notice at various dates. At first all said they had not signed it. I got each of them to write a copy of his signature, and I showed him his signature on the guarantee. After seeing

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signatures, Muldoon, Morris, Shanley, Moran, Beirne, Foley, McCrann, and Daly admitted signatures, as did also Fuery. He said he had no recollection of signing as guarantor. McKeown admitted his signature, also Joseph Beirne. Andrew Daly denied signing as guarantor, so also Lytle, McKeown, and Joseph Beirne." Cross-examined—"All the members were supposed to be guarantors. Non-members got benefits from the Creamery, and one was asked to sign. I entrusted Ahern with the guarantee to get signatures. There was one signature not genuine. I gave the guarantee on some occasions to Ahern to get signatures."

Daniel Ahern, examined—"I am manager of the Creamery Company since 1901. There was an authorized overdraft under a guarantee for £500, signed by twenty-five guarantors. William Healy also signed the new guarantee. I applied to the bank to increase to £1000: it was agreed, provided there was sufficient security. I communicated this to the society in February, 1911. I received the guarantee. There was a meeting of the committee on the 1st of March. All of the committee but one signed. Eight signed, the first names on the guarantee. The instructions to the manager to get signatures came from the committee. On the 7th of April I brought it to the bank. They were not satisfied with eight names. They were not satisfied with nineteen. I returned it with forty-three names. None of the first eight dispute their signatures." [Ahern then deposed to the signing by the various defendants, alleging that he explained the nature of the document to each.] "In spring, 1914, we were in low water. There was an opposition creamery, and the bank began to press. On the 19th October, 1914, there was a meeting of the committee. It was resolved to hold, on the 30th October, a general meeting and also a meeting of the guarantors." [Circular to guarantors and members read.] Cross-examined—"I am idle at present. My salary was £2 5*s.* per week. I am still entitled to it. All but two on the first guarantee were members of the committee. I never explained when I was getting the signatures that we were trading at a loss. That loss continued in 1913. I did not tell any who signed in that year of the loss. The general meeting at which the true state of affairs was made known was in March, 1914. Very few attend the general meetings. I never read the whole of the guarantee. I know it was the same as the October one which I read. I believed it to be a joint guarantee, and that the £1000 would be made good by all the people that signed. I believed when talking to them that it was a joint guarantee, and that no one could be made liable for more than his share. I told them I wanted £1000 to pay for manures. I did not tell them of the impending ruin of the company, for I did not believe in it." [To a juror: "Most of the signatories would owe to the society when they signed for manure."] "Most of them, not all, signed in the spring-time, when they were getting manures."

Major J. H. Murphy, examined.—I am one of the originators of the Society. I signed the guarantee. Ahern acted in pursuance of directions of the committee. I witnessed Joseph Beirne's signature. The statements in paragraph 4 of the defence are not true. In spring, 1913, two or three came in; they signed and I witnessed. I believed they knew what they were doing. Ahern had been speaking to them. One man came in, Michael Keaveny, and said the neighbours told him he had signed for £1000, which he did not intend to do. I immediately put my pen through the signature. I was in the chair at the meeting of the guarantors on the 30th October. A list of those present was called out. I added Muldoon and Goldney. A resolution was passed to appeal to the Bank for time." Cross-examined—"Some of the guarantors contested their liability, and said they did not sign."

At the close of the evidence Powell K.C. applied for a direction, which was refused. He then stated the defendants' case.

Several guarantors were called for the defence, and all repudiated having signed the document as a guarantee. Twenty of them stated that they believed they were signing for manure or goods from the Society. Three of the defendants alleged different reasons for their signatures, and their evidence, as well as William Healy's, is reported below. In the examination of the first witness for the defence, John Morris, objection was taken to a question as to his communication with Ahern. The following is the passage in the judge's report dealing with the objection:—"He was then asked as to his communication with Ahern. This was objected to.

Denning K.C. submits that evidence as to Ahern's statements was admissible on two grounds; first, in support of the defence pleaded on the authority of *Lewis* v. *Clay* (1), and *Foster* v. *M'Kinnon* (2); secondly, because Ahern must be taken to have acted as agent for the plaintiffs, citing *Chaplin* v. *Brammall* (3). I admitted the evidence on the former ground. As to the latter ground, I held that there was no evidence that Ahern acted as agent for the Bank."

The following extracts from the judge's report contain the evidence of William Healy, against whom the jury found, and of John Kennedy, Patrick M'Crann, and Joseph Beirne, who alleged reasons for signing the document differing from those of the other witnesses for the defence:—

William Healy, examined.—"I hold two shares in the Society. I did not sign the first guarantee. I never signed for £1000. I got manure. I sometimes signed for it. I was asked to sign for it. In 1913, in the spring-time, I asked for an order for two bags. I was given a docket. Ahern said: 'Write your name there,' pointing to a book left on the desk. I wrote my name and he handed me a docket. I went to the railway and got manure. There was a blank sheet of blotting-paper on the head of it, and I could not see what it was. I first heard of the guarantee from the Bank." Cross-examined—He first denied his signature to the £500 guarantee and finally admitted it.

John Kennedy, examined.—"I am an ex-head constable of the Royal Irish Constabulary. I have a farm, and five shares in the Boyle Society, and four in the Breedogue Auxiliary Society. I was on the Committee of the Breedogue Society six years ago. I signed a guarantee for the machinery of Breedogue. In April, 1912, in Boyle Creamery, Ahern said: 'Why don't you sign the guarantee for the Breedogue manure? How can you expect that the people of Carrigan will sign the guarantee for you if you don't do the same for them?' There was no co-operation on our part. He asked me to sign the guarantee for the manures. I said to Ward, 'You might as well sign too.' Ward said: 'I have signed before.' I signed the document. Not a word was said about its being a guarantee for £1000; if it had been, I would not have signed it. I thought it was some document to get manure. Not a word was said about the Bank of Ireland or any other bank. Breedogue Creamery gets manure from Boyle; I knew that Boyle was to get it from a firm. When I spoke of guarantee I meant one that the men who got manures would pay for them. The Bank had nothing to say to this. Thorpe told me about this guarantee about six months before I got the notice. I said I was not a gurantor, I had never signed. Some time after he produced the guarantee and showed me my name. I admitted my name. I remarked it was the guarantee for the Breedogue manure. I told what had occurred. Whatever the others would do, I would do. I was served with the writ on the 2nd February. I went to square matters with the Bank. I lodged £30 with the Bank. I made arrangements to pay my portion of the amount. The arrangement was not carried out." Cross-examined.—"I signed a guarantee for over £400 for machinery for Breedogue about ten years ago. I was busy about the Creamery at the same time. Not a word was said about discount on this occasion. I knew thoroughly what I thought I was doing—a guarantee to Boyle. I did not ask for how much; I was under the impression it was for four or five tons. I thought six or eight would sign. It was about that amount every year. There were names on the guarantee when I signed, Charles Ward of Breedogue."

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(1) 67 L. J. Q. B. 224.
(2) L. R. 4 C. P. 704.
(3) [1908] 1 K. B. 233.

Patrick M'Crann examined.—"I have a £1 share in the Creamery. I knew nothing of the financial position in 1910. I was to get 1s. for dividend. I said: 'Are you paying a dividend? Give me mine.' I was asked, 'Are you entitled to it?' I said, 'What do you mean?' The reply was, 'Are you a shareholder? I cannot remember every-shareholder. Sign your name here.' Not a word was said about giving security to Bank of Ireland nor about £1000." Cross-examined.—"I signed in a book. I had signed in a book many times before. I took the book to be a large one. I signed once for a dividend in 1912." Re-examined.—"I got a dividend in August, 1912. I was getting manures, and signed in that year in April. I don't remember signing in October."

Joseph Beirne, examined—"I am not a shareholder. Up to 28th June, 1913, I had nothing to do with the Society. I supplied milk to Breedogue, on the 27th October, 1913, that was the only business transaction. They owed me for milk. In November, 1913, I went to Boyle to get paid. I live ten miles from Boyle. I saw Ahern, and I asked for payment. He said it was not up to the time. I asked him to oblige me, and not to bring me in ten miles again. He said he would see about it. He sent for money to the Bank. He put a sheet of paper before me with ruling on it and blotting-paper over it, and told me to write my name there. I wrote my name. He gave me the money, and I walked out. This was the only transaction; not a word was said about guaranteeing the Creamery, or about £1000. The money was £1 6*s.* 0*d.* or £1 8*s.* 0*d.* There was not a word about the Bank. I first knew of the guarantee from the demand for payment. I said I was paid for milk." Cross-examined.—"I never signed by name before. I thought I did it because I was paid five days before the time. Major Murphy was present when I signed."

The judge's report concluded as follows:—"Powell K.C. asks me to leave to the jury the question of Ahern's agency for the Bank. I rule that there is no evidence that Ahern acted as agent for the plaintiffs. Henry K.C. objected to any question being left to the jury, except that of the signature of the guarantee by the defendants. Counsel on both sides having addressed the jury, I charged the jury, leaving to them the questions, which, with the answers, are set forth in the registrar's certificate. No objection was taken to my charge. On the findings of the jury, I gave judgment for the plaintiffs as against the defendant William Healy for £1034 15*s.* 10*d.*, with costs, and judgment for the other defendants named in the registrar's certificate with costs."

The following were the questions submitted to the jury, and the answers of the jury thereto:—

"1. Did the defendants John Morris, John Breheny, James Fuery, James O'Gara, Michael Brennan, John Shanley, John Muldoon, Bartley McDermott, William Healy, Charles Breen, Andrew Daly, William Lytle Michael Feely, Matthew Beirne, Bartley Regan, Thomas Beirne, John McKeown sign the document dated the 7th April, 1911, in the honest belief that they were executing a document to enable them to secure manures or other goods from the society, and without negligence?" Answer: "Yes, except William Healy."

"2. Did the defendants Michael Neary, Peter Handberry, James Moran, Timothy Devany sign same in the honest belief that they were executing a document to enable themselves and other persons to receive manure and other goods from the society, and without negligence?" Answer: "Yes."

"3. Did the defendant Patrick McCann sign same in the honest belief that he was signing a receipt for a dividend in respect of shares held by him in the said society, and without negligence?" Answer: "Yes."

"4. Did the defendant Joseph Beirne sign same in the honest belief that he was signing a receipt for money paid to him for milk supplied by him to the said society, and without negligence?" Answer: "Yes."

"5. Did the defendant John Kennedy sign the said document in the honest belief that he was guaranteeing other persons for manures supplied by Breedogue Auxiliary Society, and without negligence?" Answer: "Yes."

"6. Did any of the defendants, and, if so, which of them, know that the document was a guarantee of any debt which the society owed or would owe to other persons?" Answer: "None, except William Healy."

"7. Were the signatures of the defendants, or which of them, obtained by the fraudulent representation of David Ahern, that the document in question was one which did not involve them in any liability to the plaintiffs in respect of any money due, or to become due, by the creamery to the plaintiffs?" No answer.

"8. In the circumstances under which the document was signed, was there any negligence on the part of the defendants, or any, and if so, which of them, in signing the same?" Answer: "None."

The defendant Thomas Connaughton died after action brought.

The following were the grounds upon which the present motion was based:—"On the ground that the learned judge should have directed the jury to find in favour of the plaintiffs, it being admitted or proved that the several defendants had

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signed the guarantee, and that the money claimed had been advanced by the plaintiffs bona fide, and without notice, and that the learned judge was wrong in entering such judgment on the findings of the jury, and that it was not open to the jury while disagreeing as to the question submitted to them as to alleged misrepresentation of Daniel Ahern to find in favour of the defendants as to the honest belief alleged, and that (in view of such disagreement) the said findings are unsupported by evidence, and are against the weight of evidence, and that the trial was unsatisfactory."

Henry K.C. (with him *Herbert Wilson K.C.*, and *E. Murphy*), for the plaintiffs:—

The judge here ruled that there was no proof of agency to the bank on the part of Ahern, and the jury did not find that the defendants were induced to sign by fraud or misrepresentation on the part of Ahern. The findings cannot support the judgment, because in actions on contracts of this kind the defence of *non est factum*, founded on an honest belief as to the nature of the document signed, when the person signing is not guilty of negligence, must be supported by proof of fraud or misrepresentation on the part of the person procuring the signature: *Foster* v. *M'Kinnon* (1); *Lewis* v. *Clay* (2); *Carlisle Banking Co.* v. *Bragg* (3). The findings of the jury are inconsistent, on the evidence. The jury could only find honest belief in the defendants on the basis of fraud by Ahern. Either the defendants signed a guarantee knowing it to be such, or under circumstances which imported negligence on their part, or Ahern fraudulently misrepresented to them the nature of the document. To find, as the jury has done, that the defendants honestly believed the document signed to be something else, and that they were not negligent, without finding Ahern's action fraudulent, is inconsistent with the defendants' own evidence.

Powell K.C., and *Denning K.C.* (with them *W. J. Shannon*), for the defendants:—

There is no rule of law that fraud must be proved to support the defence here taken. Once a person setting up such defence is not estopped from making it, he can show his idea of the nature of the document signed; he is at liberty to show that his mind never went with the transaction in respect of which he is sought to be made liable, and that he honestly and without negligence believed the document he signed to be of a different nature from that set up. The fraud of the person procuring the signature is commonly the cause of the signatory's mistake, but it is not an essential condition to a defence of *non est factum.*

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(1) L. R. 4 C. P. 704. (2) 67 L. J. Q. B. 224. (3) [1911] 1 K. B. 489.

The jury heard the witnesses, and they were entitled to weigh the evidence.

Herbert Wilson K.C., in reply.

Cur. adv. vult.

Nov. 23.

Cherry L.C.J.:—

This case was tried by Madden J. and a special jury of the city of Dublin, at the last Trinity Sittings. There were twenty-four defendants, most of them very poor men. A great number of witnesses were examined, nearly all of them coming from the neighbourhood of Boyle, and the trial lasted for three days. The expense of it must have been very great, and it would be, in my opinion, a lamentable thing if, owing to the jury not having answered one of the questions submitted to them, we were obliged to put the parties to the great expense of another trial.

The action was brought on foot of a guarantee by the defendant to the Bank of Ireland of the debts and liabilities to the Bank of the Boyle Co-operative Society, Limited. The guarantee is in the ordinary form. It is dated the 7th April. 1911, and signed by all the defendants. Although the document is dated on that day, it was not, as a matter of fact, signed by many of the defendants until long afterwards. Some of the signatures were obtained as late as the year 1913. The whole transaction was, indeed, a very strange one. It appears that there was an earlier guarantee to the bank for £500; that a man named Ahern, who was manager of the Co-operative Society, asked the local bank manager to increase the amount to £1000, which he agreed to do, provided additional names were put to a new contract. The guarantee for £1000 now sued upon was then prepared by the bank's solicitor, and given to Ahern, who took the document away with him, and kept it at the office of the society, where nearly all the defendants signed it, their signatures being witnessed by Ahern.

At the trial Ahern swore that he explained the nature of the document to all the defendants whose signatures he witnessed, and that they all knew the purport of what they were signing. These defendants, on the other hand, positively denied this, and swore that they signed the document without being aware of its nature, and believing it to be of an entirely different character. Most of them swore that they were under the impression, when signing the guarantee, that it was a receipt for manure supplied to them. Others said that they thought that it was a receipt for a dividend, while others said that they thought that it was for milk supplied.

Madden J., at the trial, submitted to the jury a series of questions as to the knowledge and belief of each of the defendants, according to the evidence given by each of them as to his state of mind when signing the guarantee. The jury found in answer to these questions that in the case of all the defendants, save one, the document was signed by them in the honest belief that it was one of an entirely different character from what it really was, and that it was signed by them without negligence on their part. The jury also found that none of the defendants, except Healy, knew that the document was a guarantee of any debt which the society owed to other persons. But upon one question (No. 7)—" Were the signatures of the defendants obtained by the fraudulent representation of Ahern that the document in question was one which did not involve them in any liability to the plaintiffs in respect of any money due or to become due by the creamery to the plaintiffs?" they disagreed. Upon the findings in answer to the other questions I have mentioned, however, the judge gave judgment for all the defendants (except Healy) as against the plaintiffs; and the question now is, was he right in so doing?

The principle of law which the learned judge evidently had in his mind when framing the questions for the jury, was that laid down by Byles J., in delivering the judgment of the Court in the well-known case of *Foster* v. *M'Kinnon* (1), namely this:—That where a party signs a document under a fundamental mistake as to its nature and character, and that mistake is not due to negligence on his part, he is not bound by his signature, upon the ground that there is, in reality, no contract at all binding him on his part. It is true that in *Foster* v. *M'Kinnon* (1), and I think also in nearly all the cases which have followed it, the cause of the error has been fraud on the part of some person, but this is due to the fact that such error as to the nature of the document can scarcely ever exist without fraud on somebody's part. The principle of the cases is not, however, that fraud vitiates consent, but rather that there is an entire absence of consent. That the mind of the party who signs under a fundamental error does not go with the act of signing, and that there is consequently no contract at all in fact. The defendant, if he succeeds, does so upon the issue *non est factum*, not upon the issue of fraud, though fraud, as I have said, is usually present, and is generally found by the jury to have existed.

The following passage, frequently quoted with approval from the judgment of Byles J. in *Foster* v. *M'Kinnon* (1), at p. 711, clearly lays down the principle in that way: "It seems plain," he says, "on principle and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law never did sign, the contract to which his name is appended."

This passage plainly indicates that the fundamental error as to the nature of the document which vitiates the contract need not necessarily have been induced by fraud, though in the great majority of such cases fraud is present, and is the cause of the error.

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(1) L. R. 4 C. P. 704.

In the recent case of *Carlisle and Cumberland Company* v. *Bragg* (1), where the defendant was induced by the fraud of a third party to sign a guarantee to the plaintiff company in entire ignorance of the nature of the document, the decision of the Court of Appeal in England was based upon the same principle. This most clearly appears from the judgment of Kennedy L.J.: "I entirely assent," he says (2), "to the exposition which has been given of the law with regard to *non est factum* as a defence. The principle involved, as I understand it, is that a consenting mind is essential to the making of a contract, and that in such a case as this there was really no consensus, because there was no intention to make a contract of the kind in question."

In *Lewis* v. *Clay* (3), a case tried by Lord Russell of Killowen, where the defendant was induced by a fraudulent misrepresentation to sign a promissory note, judgment was given in his favour upon this ground, though the question of fraud was not left to the jury at all.

For these reasons, I am of opinion that the learned judge at the trial was right in giving judgment for the defendants upon the answers to the first six questions, notwithstanding the disagreement of the jury upon the question as to fraudulent representation by Ahern; and that unless we set aside these findings in favour of the defendants the judgment in their favour should be allowed to stand.

As to the application to set aside the verdict upon the ground that it was against the weight of evidence, which was put forward but not very seriously pressed by Mr. Henry and Mr. Wilson, I think it is sufficient for me to say that the learned judge who presided at the trial has not expressed any disapproval of it. On the contrary, by giving judgment upon it, in a somewhat doubtful case, he seems to me to indicate that he did not think it an unreasonable or perverse verdict. It was really a question whether the jury believed Ahern or the defendants. They, and

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(1) [1911] 1 K. B. 489.

(2) [1911] 1 K. B., at p. 497.

(3) 67 L. J. (Q. B.) 224.

K. B. Div.
1915.

Bank of Ireland v. M'Manamy.

Cherry L.C.J.

the judge, heard and saw all the parties, and they came to the conclusion that the evidence of the defendants was in substance true. In the absence, as I have said, of any disapproval of their findings by the learned judge, I should be very slow to set aside the verdict on the ground that it was against the weight of evidence.

On all the grounds, therefore, I am of opinion that the verdict and judgment should stand, and that the application for a new trial should be refused.

Boyd J. concurred.

Solicitor for the plaintiffs:—*C. J. Rutherford.*
Solicitor for the defendants:—*J. McCarthy & Sons.*

C. N. K.

INLAND REVENUE COMMISSIONERS *v.* LEMON (1).

K. B. Div.
1915.
May 13.

Revenue—Undeveloped Land Duty—Finance (1909–10) *Act*, 1910 (10 *Ed.* 7, *c.* 8), *s.* 16, *sub-s.* 2 (*b*)—*Deduction in respect of Expenditure in Development.*

The owner of land, the subject of a scheme for land development, and within the borough boundary of a city corporation, arranged with the corporation that they should take over and make a road, existing on the land and prior to the arrangement a private road for the upkeep of which the owner of the land was liable, on condition that he dedicated for the purpose of the road a margin 10 feet in width.

Held, that in assessment for undeveloped land duty the owner, having by his bargain purchased the labour of the corporation, was entitled to allowance in respect of the "site value" as having "incurred expenditure" on the road within the meaning of sect. 16. sub-s. 2 (b), of the Finance (1909–10) Act, 1910 (10 Ed. 7, c. 8).

The Finance (1909–10) Act, 1910, does not interfere with the power of a landowner to make bargains with respect to "site value" (*per* Palles C.B.).

Petition by way of appeal by the Inland Revenue Commissioners under section 33 (4) of the Finance (1909–1910) Act, 1910 (10 Ed. 7, c. 8), from the decision of a referee under the Act.

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(1) Before Palles C.B., and Madden and Kenny JJ.

Mr. Archibald D. Lemon was on the 13th March, 1913, assessed by the Commissioners of Inland Revenue for the year 1909–1910 for "undeveloped land duty" under the Finance (1909–1910) Act, 1910 (10 Ed. 7, c. 8), in respect of lands situate at Hollywood Road, Belfast, under the following assessment, viz.:—"Identification Number, 3665. Description and nature of land, Hollywood Road. Area of land, 16A. 3R. 27P. Site value, £4,229. Agricultural value of agricultural land, £566. Land occupied with dwelling-house, £1,400. Allowance to avoid charging fractions of 1*d.*, £1. Total deductions, £1,967. Net value chargeable with duty, £2,262. Undeveloped Land Duty at ½*d.* in the pound on the value in column (6) (*i.e.* the £2,262), £4 14*s.* 3*d.*

On the 26th April, 1913, Mr. Lemon appealed against the assessment. The grounds of appeal were stated by his solicitor as follows:—"The refusal of the Commissioners to make my client, Mr. A. D. Lemon, an allowance in respect of the widening, making, and completing, by the Corporation of the City of Belfast, of the street known as Sydenham Avenue. (1) The agreement entered into by Mr. A. D. Lemon with the City Corporation was that if Mr. Lemon would grant them (the Corporation) sufficient ground to enable them to widen Sydenham Avenue to a width of 30 feet, the Corporation would then make, pave, and otherwise fully complete said avenue. (2) Mr. Lemon has now given said ground, and the street has been completed by the Corporation at a cost of £600. (3) The making of the street has not increased in any way the letting value of the ground, because if this ground is developed by giving it to the Corporation, Mr. Lemon has greatly decreased the frontages to side street, and therefore the broadening of Sydenham Avenue has in no way added to the letting value of Mr. Lemon's holding. (4) The Corporation have been paid by my client for their expense of making this Avenue, if not in money, at least in kind, by the grant of the additional ground, and therefore Mr. A. D. Lemon claims that he should be allowed for the sum spent in making this Avenue by the Corporation under section 16 (3), namely, the sum of £600."

Mr. George Hewson, one of the panel of referees appointed under the provisions of section 33 (2) of the Finance (1909–1910)

Act, 1910 (10 Ed. 7, c. 8), held the consultation prescribed by section 33 (3) of the statute, and on the 21st January, 1914, gave his decision as follows:—

"The facts appear to be that in 1896 the road (Sydenham Avenue), which was about 20 feet in width, was brought inside the Belfast borough boundary, but not adopted by the Corporation, that is to say, that the owner remained responsible for its upkeep, and could be compelled by the Corporation to keep it in repair. In the years 1909, 1910, communications were opened between the Corporation and the owner, having in view the adoption of the road by the Corporation, with the result that in 1910 the road was taken over by the Corporation on the understanding that the owner was to give the Corporation an average of 10 feet of his frontage for the purpose of widening the road and providing the necessary footpath. The length of the road involved was approximately 860 feet. The owner was also called upon to erect a new fence to replace the existing one bounding his property, which he did at a cost of £43. The road was widened and put in repair by the Corporation, and a footpath made at a cost of £520. The estate was considerably improved by this work, and the public were also benefited by having a good thoroughfare between Hollywood Road and Belmont. It appears that the appellant should get some credit for his outlay, and also for the land he had to surrender to the Corporation, over and above the benefit he received by having the road taken off his hands, and that he should be allowed £100 as his expenditure on the road under section 16, sub-section 2 (*b*), such allowance to date from 31st March, 1911. It appears that a scheme of development of this frontage, which included the widening of the road, was made as far back as 1896. No expenses to either party."

From this decision the Commissioners appealed, by their petition, on the following grounds:—"(1) That the owner or his predecessors in title had not, with a view to the land being developed, incurred any expenditure on roads within the meaning of section 16 (2) (*b*) of the Finance (1909–1910) Act, 1910, and that the arrangement between said Archibald D. Lemon and the Corporation of Belfast was in truth and in fact an appropriation of land by the said Archibald D. Lemon for the purpose of a street, road, or path. (2) That there is no authority in the said

K. B. Div. 1915.

INLAND REVENUE COMMRS. v. LEMON.

Act for the allowance of a deduction in respect of expenditure on fences."

James Rearden (with him *The Solicitor-General, James O'Connor K.C.*), for the Inland Revenue Commissioners:—

Mr. Lemon's right in the matter depends on the construction to be given to sect. 16 (2) (*b*) of the Finance (1909–10) Act, 1910 (10 Ed. 7, c. 8). The only expenditure incurred has been the £43 spent by Mr. Lemon on the fence and the £500 or £600 spent by the Corporation on the road, including the 10-feet strip given up by Mr. Lemon. The Commissioners contend (1) that fences do not come within the section, and (2) that the expenditure has not been by Mr. Lemon. If Mr. Lemon had spent £600 on the road, he could not claim the expenditure and the capital value of the road. The language of sect. 16 (2)(*b*), "incurred expenditure," shows that the provision relates to the actual expenditure of money. Mr. Lemon can get allowed for the dedication of the land under sect. 25 (4) (*c*) of the statute in respect of assessable site value. This question of appropriation is thus specifically dealt with by the Legislature, and its effect on assessment contrasted with that of deduction in respect of expenditure. Supposing that two adjoining owners held the site, and one, A, gave up land for the road, and the other, B, expended £500; according to Mr. Lemon's contention A would be entitled to B's expenditure as a return for his dedication, and B being entitled clearly under the section in respect of expenditure, there would be two allowances in respect of one actual expenditure.

T. W. Brown for Lemon:—

The object of the provisions as to undeveloped land duty is the taxation of persons who have in their hands land which ought to be developed. Every condition required by sect. 16, sub-s. 2 (*b*), has been fulfilled if there has been expenditure by Lemon, and the net question for decision is whether he has incurred expenditure in relation to the road. If Lemon had refused to dedicate the 10-feet strip which the Corporation required, that body would have had to purchase it. In effect the result of the bargain arranged between Lemon and the Corporation was the purchase by the former of the expenditure by the latter. Lemon gave up the 10-feet strip. The consideration for his so doing was the expenditure by the Corporation on the making of the road. The words of the section are "incurred expenditure"; those words are not limited to actual payment of expenses, but are wide enough to cover what was done here.

The Solicitor-General in reply.

Palles C.B.:—

We have carefully considered this case. It involves a very interesting point; but we are of opinion that Mr. Brown's contention is right, although, of course, we consider that Mr. Lemon cannot get allowance twice in respect of the value of this plot of ground.

I was very much struck by the observations of the learned Solicitor-General, but, on consideration, I do not think that the Finance (1909–10) Act, 1910 (10 Ed. 7, c. 8), interferes with the power of a landowner to make a bargain in respect of the "site value." Here, undoubtedly, Mr. Lemon made a bargain with the Corporation of Belfast by which he purchased the labour of the Corporation, and Mr. Lemon is entitled to allowance in respect of that bargain; but we will put upon the face of our order that that allowance is in respect of the site-value of the 10-feet strip of road dedicated by Mr. Lemon to the public.

We accordingly dismiss this appeal with costs.

The following is the material portion of the order made:—

It appearing that in fixing the assessable site value of said land by the Commissioners of Inland Revenue no account was taken, and no deduction was allowed, in respect of the expenditure by the Corporation of the City of Belfast on the road mentioned in the said Petition of Appeal, and the Court being of opinion that such expenditure was made at the instance of the said Archibald D. Lemon under circumstances which entitled him to be held as having made such expenditure, and that he should be allowed the sum of £100 in respect thereof, the Court doth dismiss the said appeal with costs to be paid by the said Commissioners to the said Archibald D. Lemon when taxed and ascertained.

Solicitor for the appellants: *The Solicitor of Inland Revenue for Ireland.*

Solicitor for the respondent: *John Graham.*

C. N. K.

K. B. Div.
1916.
Jan. 13.
Feb. 8.

MAURICE GLEESON, APPELLANT; TIMOTHY HURLEY, RESPONDENT (1).

Justices—Trespass in pursuit of Game—Evidence of Absence of Authority or Permission—Onus of Proof—27 Geo. III, c. 35.

The appellant, a gamekeeper, as a common informer prosecuted the respondent for trespass in pursuit of game under 27 Geo. 3, c. 35. Evidence was given that the respondent was found on the lands of L, to whom the game rights belonged, with a dog and gun, and that the respondent had shot a pheasant on L's lands. The pheasant was illegally shot, as it was the close season. On being challenged, the respondent stated he had " the right to shoot there," and would do so again. L. was not called to disprove permission or authority to the respondent to enter the lands. The justices dismissed the complaint, holding that there was no evidence that the respondent had entered L.'s lands without his authority. On a case stated:

Held, that in such prosecutions the whole circumstances might warrant an inference of want of authority from the occupier of the lands, even without direct evidence that such authority had not been given, and that there was evidence in the present case to support the complaint. Amongst other matters it could not be presumed that the occupier of the lands would authorize illegality, and the respondent's act in shooting the pheasant was admittedly illegal.

Quaere, in a prosecution for trespass in pursuit of game, does the onus lie upon the prosecutor to negative the consent of the occupier of the lands, or upon the defendant to prove such consent ?

CASE STATED, under 20 & 21 Vict. c. 43, by the justices of the peace for the county of Kerry sitting at petty sessions at Killarney on the 23rd November, 1915.

The appellant, a gamekeeper of Lord Kenmare, as a common informer charged the respondent with having on the 30th September, 1915, entered on the lands of Gortroe, in the occupation of John Maher Loughnan, to shoot game thereon, being then and there provided with a dog and gun, and not being authorized to enter by any person entitled to give permission.

The complaint came on for hearing before the justices who stated the case, on the 23rd November, 1915, at Killarney petty sessions, when, after hearing evidence, the justices dismissed the complaint. The material portions of the evidence and conclusion of the Bench were stated in the case as follows:—

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(1) Before GIBSON and DODD JJ.

"On behalf of the complainant [the appellant] evidence was given that the defendant was seen on the lands of Gortroe with a dog and gun, and that he shot a pheasant. When spoken to by the complainant he said he had a right to shoot there, and would do so again. Lord Kenmare was the owner of the lands, but they were let on a yearly tenancy to Mr. John Maher Loughnan. The game was not reserved to Lord Kenmare. Evidence to the above effect having been given, Mr. Huggard, who appeared for complainant, closed his case. Mr. McCartie, who appeared for the defendant, asked us to dismiss it, as no case, he submitted, had been made against his client. Mr. Huggard asked us to adjourn the case, so that he might procure evidence from Mr. Loughnan as to whether or not he had given permission. This was opposed by Mr. McCartie on the grounds that Mr. Huggard had closed his case, and that if he wished for the attendance of Mr. Loughnan he should have issued a summons for his attendance. We refused to grant the adjournment, and, having consulted, we found that there was no evidence that the defendant did enter the lands mentioned in the summons to shoot game there without being duly authorized, and accordingly we dismissed the summons without prejudice. And the opinion of the Court is sought as to whether we were right in law in dismissing said complaint."

Bernard Roche for the appellant:—

The onus of proving permission lay on the respondent. His act was a trespass, and it lay upon him to show that it was not a trespass because it was by permission: *R.* v. *Turner* (1); *R.* (*Sheahan*) v. *Cork Justices* (2); *Rex* (*Connolly*) v. *Tyrone Justices* (3); *Tyrrell* v. *Flanagan* (4); *Bridger* v. *Whitehead* (5); 1 & 2 Will. 4, c. 32, s. 42; 23 & 24 Vict. c. 90, s. 13; 40 & 41 Vict. c. 56, s. 78.

Apart from this, there was evidence here to found a conviction.

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(1) 5 M. & S. 206.
(2) [1907] 2 I. R. 5.
(3) [1902] 2 I. R. 78.
(4) [1901] 2 I. R. 423.
(5) 8 A. & E. 571.

The shooting of a pheasant at the time could not have been authorized at all, as it was an illegal act, and the respondent's statement to the appellant was an assertion of a general right or claim of right to trespass where he liked.

Cur. adv. vult.

Feb. 8.

GIBSON J.:—

In this case the justices dismissed a complaint by Lord Kenmare's gamekeeper, as a common informer, under 27 Geo. 3, c. 35, on the ground that there was no evidence of the offence. The respondent (who has not appeared to support the order), on September 30th, at an hour not stated, shot a pheasant on lands occupied by Loughnan, a yearly tenant on the Kenmare estate. The latter, to whom the game rights belonged, was not examined to negative authority or consent. The pheasant was shot during close time, and Hurley's act was illegal.

Mr. Roche relied on two points—(1) that, under the Act 27 Geo. 3, c. 35, and the Game Acts as a whole, the onus lay on the defendant to show that the prima facie trespass was excused by the occupier's consent, as in an action for civil trespass; and (2) that on the evidence there was enough to warrant a conviction.

As to the first point the argument is as follows:—In a game prosecution it is not necessary for the prosecutor to prove that the defendant possesses the necessary qualification: *Turner's Case* (1). Similarly, in cases where a written licence is required to justify defendant's act, as in sale of drink: *R.* v. *Hansen* (2); or for theatres: *R.* v. *Neville* (3); or for supply of seamen: *Turner* v. *Johnston* (4); or, as in *Larkin's Case* (5), the onus lies on the defendant. Under the English Act 1 & 2 Will. 4, c. 32 (in part applied to Ireland), a defendant prosecuted for trespass in pursuit of game has to prove the excuse. The Irish amending Act, 27 & 28 Vict. c. 67 (as to landlord's reserving an exclusive right to game), founded on sect. 30 of the Act, 1 & 2 Will. 4, treats the landlord's right as based on trespass on a presumed occupation. It is to be noted that in sect. 42 of the English statute the burden of proof is expressly put on the defendant, but this provision is not extended to our Game Act. Much reliance is placed on *R.* (*Sheahan*) v. *Cork Justices* (1), followed in *Gorey's Case* (2), and sect. 78 of the Act of 1877, c. 56, and it is argued that the occupier's consent is a matter of justification or excuse to what is a prima facie trespass, and is within sect. 78.

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(1) 5 M. & S. 206.

(2) Sargent, Licensing Laws, p. 215.

(3) 1 B. & Ald. 489.

(4) 51 J. P. 22.

(5) [1908] 2 I. R. 214.

This first question, which could have been disposed of in previous cases, where on the facts it arose but was overlooked, we leave open for further determination, as it is unnecessary to decide it. We are of opinion that the second ground of the argument is right, and that there was evidence, assuming in defendant's favour that the onus of proof rested on the prosecution.

Any entry on the lands of another is prima facie trespass, which in civil cases has to be met by a defence of leave and licence or other matter of excuse. In a game prosecution, as indeed in other cases, the whole circumstances may warrant an inference of want of lawful authority. The time and hour, the person, his conduct, action, language, and demeanour, the circumstances of the act, may indicate prima facie guilt. Here the act complained of could not have been lawfully authorized by anyone; and all that defendant said when challenged was that he had a right to shoot there, and would do so again. An authority from an occupier to shoot must be strictly followed: Lord Halsbury's Laws of England, "Game," sect. 482; and it is not to be presumed that the occupier authorized illegality. We hold, therefore, that there was evidence to support the complaint, and that the decision below was erroneous.

The case will be remitted to the justices with a direction that there was evidence of the offence charged on which they might properly convict. The defendant must pay the costs.

Solicitor for the appellant: *W. Huggard.*

C. N. K.

(1) [1907] 2 I. R. 5. (2) [1912] 2 I. R. 1.

K. B. Div.
1915.
Nov. 11.

THE KING (CARROLL) *v.* THE COMMITTEE OF THE ARMAGH DISTRICT LUNATIC ASYLUM (1).

Local Government—Asylum Officers—Superannuation Allowance—Dispute—Decision by Lord Lieutenant—Finality of Decision—Mandamus to enforce—Asylum Officers' Superannuation Act, 1909 (9 *Ed.* 7, *c.* 48), *s.* 2 (1), *ss.* 15, 19.

In deciding a dispute under sect. 15 of the Asylum Officers' Superannuation Act, 1909 (2), as applied to Ireland by sect. 19, the Lord Lieutenant acts in an administrative and not in a judicial capacity, and his decision, whether given in writing or orally, is binding on the Court as a final determination of the matter in dispute.

MANDAMUS.

On the 10th December, 1900, the prosecutor entered the employment of the Committee of the Armagh District Lunatic Asylum as a second-class division attendant, and from that date until the 25th July, 1913, he was employed by the committee in a permanent capacity. For about two years preceding the latter date he was an established officer or servant of the first class.

On the 26th July, 1913, he became ill and unable to attend to his duties; he remained away until the end of September. At the request of the resident medical superintendent he returned to the asylum on the 29th September, and stayed at work till the 23rd October, when he felt too ill to continue at his duties. The resident medical superintendent then told him to go to bed in the asylum, or to resign and go home. He went home, and on the advice of his doctor resigned his appointment.

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(1) Before CHERRY L.C.J. and MADDEN and BOYD JJ.

(2) 9 Edw. 7, c. 48, s. 15 :—"In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State, whose decision shall be final."

Sect. 19. "In the application of this Act to Ireland . . . references to the Lord Lieutenant shall be substituted for references to the Secretary of State."

Subsequently the prosecutor applied for a superannuation allowance under the Asylum Officers' Superannuation Act, 1909 In support of that application he forwarded the following certificate, signed by Dr. Johnston, of Gilford, to the resident medical superintendent:—"After illness for three months and incapacity for duty, I advise John Carroll of Mullahead to resign the post of attendant at Armagh Asylum. He has suffered from rheumatism and bronchial catarrh and neuralgia, and has lost 2½ st. in weight. I consider that to resume duty would be prejudicial to his health." Having received no reply from the Asylum committee, the prosecutor sent a copy of his application to the Local Government Board, and they transmitted it to the inspectors of lunatics, whose secretary, Mr. James Smith, thereupon wrote to the committee on the 31st of December, 1913, as follows:—"I am directed by the inspectors to request that you will kindly favour them with your observations regarding the accompanying letter from ex-attendant John Carroll, which please return with your reply." In a reply dated the 2nd January, 1914, the resident medical superintendent stated that a day or two after the 29th September, "I told him [the prosecutor] that he should stay here under our observation, and gave him the choice of going home and tendering his resignation, and staying on and being treated for his ailments here; he selected the former and went away; he applied to the committee for superannuation, which, under the circumstances, the committee refused." In a letter dated the 5th January, 1914, the inspectors directed the attention of the committee to sections 2 and 15 of the Act, and stated: "Having regard to section 15 of the Act, which confers the right of appeal to the Lord Lieutenant in case of dispute, the inspectors would suggest that the committee should afford John Carroll another opportunity of being medically examined, with a view to determining his fitness or unfitness for duty." On the 21st April, 1914, the resident medical superintendent informed the inspectors that John Carroll was "examined carefully by the medical staff, who certified to the committee that they could not find anything that would permanently incapacitate him from ordinary work. The committee then decided that they could not grant him any pension, and as John Carroll had already resigned, there was nothing more to be done." In a subsequent letter the resident medical superintendent said that the asylum medical staff could not find anything that would "permanently incapacitate him from any duties, asylum or otherwise."

On the 3rd August, 1914, the prosecutor sent to the committee the following certificate, signed by Sir William Whitla, M.D.:—"I have examined John Carroll, aged 34 years. I find him weak and unable for any duty. He is suffering from severe neurasthenia, and he weighs 12 st. 4 lbs. He states that fourteen months ago his weight was 15½ st." The committee decided that this certificate did not alter the position, and that they were still obliged to refuse Carroll's application for a superannuation allowance, being convinced that he had failed to obtain a certificate of permanent unfitness.

The prosecutor then appealed to the Lord Lieutenant. On the 1st October, 1914, the inspectors of lunatics sent the following communication to the resident medical superintendent:—"With reference to your communication of the 24th April last, and previous correspondence, I am directed by the inspectors to state, for the information of your committee, that John Carroll having appealed to the Lord Lieutenant, under the 15th section of the Asylum Officers' Superannuation Act, 1909, His Excellency has decided that appellant is entitled to a superannuation allowance in accordance with the terms of section 2 of that Act; and His Excellency directs that Carroll be granted an allowance accordingly, from the date of his retirement from the service of the committee."

The committee presented a memorial to the Lord Lieutenant stating that they had not had any official notice of such appeal, and had no opportunity of submitting their reasons for declining to grant Carroll a superannuation allowance. Having re-stated their reasons, they prayed His Excellency to re-consider his decision. This memorial was also submitted to, and considered by, His Excellency's advisers, who, after a full consideration, were unable to advise His Excellency to vary the decision already arrived at and notified to the Committee.

Mr. H. B. Armstrong, chairman of the Asylum Committee, in an affidavit showing cause, stated that the alleged decision of the Lord Lieutenant was arrived at without jurisdiction and in a manner contrary to natural justice, and that the committee were not bound thereby. He further submitted that the prosecutor had not shown that the Lord Lieutenant had, by any order under his hand or the hand of any person authorized by law to act for him, furnished the necessary evidence of any decision arrived at, or made, by His Excellency in the case, or that any proper legal evidence of any such decision was in existence.

Mr. James Smith, chief clerk of the office of Inspectors of Lunatics, stated in an affidavit that the committee had every opportunity of presenting to the Lord Lieutenant—and did in fact present—their reasons against the granting of the pension. The decision of His Excellency's advisers was come to on the 18th September, 1914, and on the 12th February, 1915, the Lord Lieutenant intimated his approval of the decision by writing on a minute "approval" and initialing the same.

The present motion was to make absolute a conditional order for a writ of mandamus directed to the committee of the Armagh District Lunatic Asylum, commanding them to pay to the prosecutor a superannuation allowance under the provisions of the Asylum Officers' Superannuation Act, 1909.

Ellison for the prosecutor:—

All the conditions prescribed by section 2 (1) of the Asylum Officers' Superannuation Act, 1909, existed in this case. There is, upon the correspondence, sufficient evidence to show that the dispute was submitted to the Lord Lieutenant, and that he gave a decision in favour of the prosecutor. His Excellency was satisfied that the prosecutor had been medically certified to be permanently incapacitated for asylum duties. The decision of the Lord Lieutenant under the Act is an administrative and not a judicial act; and as an act of State is not capable of being reviewed by the Courts. If the determination of a dispute by the Lord Lieutenant were held to be a judicial act, the result would be to inflict great hardships upon asylum attendants, because if the decision were wrong on the face of it they would have no remedy.

The only possible way by which they could question such an order would be by proceedings for certiorari or mandamus; but no such proceedings would lie against the Lord Lieutenant: *The Queen* v. *The Lords Commissioners of the Treasury* (1); *The Queen* v. *The Secretary of State for War* (2).

The expression "natural justice" does not mean that all the procedure of a court of law has to be followed: *Local Government Board* v. *Arlidge* (3). Here the authorities gave the asylum committee ample opportunity of presenting all material facts; and the entire facts were before the Lord Lieutenant's advisers before he gave his decision. The asylum committee do not now disclose any additional facts.

In any event, section 15 of the Act provides that the decision of the Lord Lieutenant "shall be final."

Serjeant Matheson K.C. and *C. Murphy*, for the respondents:—

In face of the opinion of their own medical officers it was impossible for the committee to accede to the application of the prosecutor for a superannuation allowance. There is no evidence of permanent incapacity. The medical certificates produced by the prosecutor do not comply with the terms of the Act. There is no proper evidence of any decision by the Lord Lieutenant. When disputes arise under the Act, His Excellency acts as a statutory arbitrator, and not in his capacity as representative of the Crown. When the appeal was lodged, the committee were entitled to have notice of it, and to be given an opportunity of presenting their case in some way suitable to the character of the inquiry: *The King (Cairns)* v. *The Local Government Board* (4), *per* Madden J., at page 345.

Ellison was not called on to reply.

CHERRY L.C.J.:—

This is an application to make absolute a conditional order for a writ of mandamus, directed to the Committee of the Armagh District Lunatic Asylum, commanding them to pay to the prosecutor a superannuation allowance under the provisions of the Asylum Officers' Superannuation Act, 1909. That Act was passed for the purpose of conferring on asylum officers in Great Britain and Ireland superannuation allowances in case of old age or permanent illness. In reference to illness section 2 (1) provides :—" Any established officer or servant of the first class . . . who is permanently incapacitated for asylum duties after ten years' service, by injury or illness, mental or bodily, medically certified, and not attributable to his own misconduct, shall be entitled on resigning or otherwise ceasing to hold his employment, to receive during life or incapacity a superannuation allowance." Section 15 provides that—" In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State, *whose decision shall be final.*" Section 19 provides that in the application of the Act to Ireland references to the Lord Lieutenant shall be substituted for references to the Secretary of State. These are the only provisions of the Act to which I need refer.

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(1) L. R. 7 Q. B. 387.

(2) [1891] 2 Q. B. 326.

(3) [1915] A. C. 120, at p. 138.

(4) [1911] 2 I. R. 331.

It is quite clear on the wording of the 2nd section of the Act that the applicant for a superannuation allowance must produce a medical certificate, showing that he is suffering from some illness likely to produce permanent incapacity. In case of dispute, it is clear that the question must be referred to the Lord Lieutenant. It is not necessary that the Lord Lieutenant should, in person, attend to the matter. It would be absolutely impossible for the Secretary of State in England to attend personally to the enormous number of cases that must arise there under the Act. In deciding disputes under the Act, the Lord Lieutenant acts, not in a judicial capacity, but as head of the executive, and his decision is, therefore, an administrative act. Furthermore, I am of opinion that once it is shown that there has been a decision by the Lord Lieutenant there is an end to the matter, whatever his decision may be. I can give no other meaning to the words " whose decision shall be final," occurring in section 15.

What are the facts in the case? [His Lordship stated the facts preceding the prosecutor's application to the Local Government Board, and continued:—] Carroll, the prosecutor, knowing that the Local Government Board superintends some of the operations of the Asylum Committee, wrote a letter to that Board, putting his case before them. The Board transmitted the letter to the Inspectors of Lunatics, whose office is at Dublin Castle. They are under the control of the Lord Lieutenant, as the head of the Executive; and they are the proper and natural officials to whom matters of this kind ought to be referred. They at once forwarded Carroll's letter to the resident medical superintendent of the Armagh District Lunatic Asylum, and, at the same time, asked for his observations on it. That letter stated:—"I am directed by the Inspectors to request that you will kindly favour them with your observations regarding the accompanying letter from ex-attendant John Carroll, which please return with your reply." What was the object of that letter? It was clearly and distinctly for the purpose of enabling the Committee to make its case, and to state what answer it had to make to the application by Carroll for superannuation, and it was so treated by the Committee, because on the 2nd January, 1914, the resident medical superintendent replied to it, going into the whole case; complaining of the conduct of Carroll, and suggesting that he was not permanently incapacitated. "I told him," said the resident medical superintendent, "that he should stay here under our observation, and gave him the choice of going home and tendering his resignation, or staying on and being treated for his ailments here—he selected the former and went away; he applied to the Committee for a superannuation allowance, which, under the circumstances, the Committee refused." The whole case of the Committee was put before the Inspectors in that letter.

From the entire correspondence it appears that at every stage in the proceedings the committee was given an opportunity of making its case. In a letter dated the 5th January, 1914, Mr. James Smith, secretary to the Inspectors of Lunatics, wrote to the resident medical superintendent drawing attention to sects. 2 and 15 of the Asylum Officers' Superannuation Act, 1909, and suggesting that the committee should afford John Carroll another opportunity of being medically examined. This suggestion was adopted by the committee. Carroll was again examined by three of the asylum doctors, and upon their report the committee decided—I will not say improperly—not to grant him a superannuation allowance. Carroll then presented a formal petition to the Lord Lieutenant asking that he should be awarded a superannuation allowance, and the matter was again gone into by the Inspectors of Lunatics. Finally, by a letter dated the 1st of October, 1914—the most important letter in the case—the decision arrived at on the dispute was communicated by Mr. Smith to the resident medical superintendent. That letter is as follows:—

"With reference to your communication of the 24th of April last, I am directed by the inspectors to state, for the information of your committee, that John Carroll having appealed to the Lord Lieutenant, under the 15th section of the Asylum Officers' Superannuation Act, 1909, His Excellency has decided that the applicant is entitled to a superannuation allowance in accordance with the terms of section 2 of that Act, and His Excellency directs that Carroll be granted an allowance accordingly from the date of his retirement from the service of the committee." I hold that that letter is complete and ample evidence, for us, of the decision by His Excellency on the dispute between Carroll and the committee, and that the decision itself is binding on this Court as a final determination of the matter in dispute. It is not necessary that there should be any formal proceedings; in fact the object of the Act is to avoid technicalities and formalities, and to get at the merits of each case quickly, without expense or delay.

It matters not whether the decision of the Lord Lieutenant was in writing or oral. If he has given any decision, it is final and conclusive. The letter which I have just quoted indicates that there was a dispute, and that a decision upon it was given by the Lord Lieutenant. That being so, the case of the respondents falls to the ground.

I am, therefore, of opinion that the conditional order for a writ of mandamus must be made absolute.

Madden and **Boyd** JJ. concurred.

Solicitors for the prosecutor: *Williams & Wallace.*

Solicitors for the respondents: *Joshua E. Peel & Son.*

C. L.

K. B. Div.
1915.
Nov. 17.

DONOHOE *v.* FLAVELLE (1).

Practice—Service out of the Jurisdiction—Notice of Motion for liberty to issue Execution under Order XLII, rule 24*—Notices under Courts* (*Emergency Powers*) *Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 78).

Leave may be given to serve out of the jurisdiction a notice of motion for liberty to issue execution under Order XLII, rule 24 (*a*), six years having elapsed since the judgment, and there having been a change in the parties.

Leave may also be given to serve out of the jurisdiction the necessary notices required by the Courts (Emergency Powers) Act, 1914.

Application on behalf of T. J. Little for liberty to serve notice of motion out of the jurisdiction. The plaintiff, on the 29th April, 1909, had obtained a judgment in the King's Bench Division for £39 and costs, which were taxed at £11 18*s*. 10*d*. The judgment was on the 29th June, 1910, assigned to William John Cooney, and by indenture, dated the 12th March, 1915, William John Cooney assigned the same to the applicant, T. J. Little. The judgment was still unsatisfied, and notice of the assignment had been given to the defendant in the action, who was residing in England, and was a British subject. The present application was for liberty to serve notice of motion out of the jurisdiction on the defendant for leave to issue execution against the defendant on foot of the judgment, which was now more than six years out of date, and also for liberty to serve the necessary notices required by the Courts (Emergency Powers) Act, 1914.

John Costello, for the applicant, referred to Order XLII, Rule 24 (*a*); Order XI, Rule 10; *Meehan* v. *Tynan* (2); *Johnstone* v. *Massey* (3).

The Court made the following order:—"It is ordered that the said Thomas J. Little be at liberty to serve a notice of motion herein out of the jurisdiction personally on the defendant for leave to issue execution against the defendant on foot of the said judgment, together with the necessary notices required by the Courts (Emergency Powers) Act, 1914, ten days at least to elapse between the service of the said notice of motion and notices aforesaid and the return thereof."

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(1) Before Kenny J.

(2) [1915] 2 I. R. 52.

(3) 12 I. L. T. 242.

Solicitor for the applicant: *John T. Doyle.*

A. E. C.

THOMAS M'INERNEY, Applicant; THOMAS L. CONSIDINE and WILLIAM R. DAWSON, INSPECTORS OF LUNATICS, Respondents (1).

Appeal.
1915.
Feb. 16.

Employer and Workman—Compensation for Injury—"Payment, allowance, or benefit" received by workman from employer during incapacity—Pension under Superannuation Acts—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *sch.* 1, *clause* 3.

A workman, by the terms of his employment, came within the provisions of the Superannuation Acts as to pensions. He sustained an injury from an accident arising out of and in the course of his employment, and was retired from the employment on a pension granted by the Treasury under the Superannuation Acts.

Held, that the amount of this pension was not to be taken into account in determining the amount of compensation to be awarded to the workman under the Workmen's Compensation Act, 1906; at all events in the absence of evidence that the pension put the workman in a better position to contract in the labour market.

Appeal from an award of the Recorder of Dublin, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a man aged fifty, had been employed for twenty-one years as an attendant at the Central Asylum, Dundrum, County Dublin, and was in receipt of wages which, with allowances, amounted to £1 18*s.* a week. By the terms of his employment he came within the provisions of the Superannuation Acts as to pensions. On the 10th December, 1913, he sustained an injury to his shoulder by an accident arising out of and in the course of his employment, in consequence of which he was unable to move his arm above the shoulder, and was rendered unfit for further service in the Asylum. On the 24th July, 1914, he was retired from the employment, and was granted by the Treasury a pension

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(1) Before O'Brien L.C., and Moriarty and Ronan L.JJ.

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of £21 15*s.* 7*d.* a year, under the provisions of the Superannuation Acts. He applied to the Recorder of Dublin for compensation under the Workmen's Compensation Act, 1906, in respect to the injury. After hearing the evidence the Recorder made the following award:—

"Having duly considered the matters submitted to me, I do make my award as follows:—

"1. I order that the respondents do pay to the applicant the weekly sum of nine shillings and sixpence as compensation for personal injury caused to the applicant on the 10th day of December, 1913, by accident arising out of and in the course of his employment as a workman employed by the respondents, such weekly payments to commence as from the 24th day of July, 1914, and to continue during the total or partial incapacity of the applicant for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the above-mentioned Act."

[2. Provided as to costs and witnesses' expenses.]

The Recorder, at the end of his note of the evidence, stated:—"I awarded 9*s.* 6*d.* from the 24th July, weekly, until further order. In doing so I had regard to all the proved circumstances, including the fact that the applicant has (though not the amount of it) a pension from the employment."

The applicant appealed to the Court of Appeal from the award of the Recorder, on the ground that he was wrong in point of law in taking into account as an allowance, payment, or benefit, or otherwise received by the applicant, the pension of £21 5*s.* 7*d.*, of which the applicant was in receipt from the Treasury in respect of past services rendered by him as attendant at the asylum.

Swayne, for the applicant.

Macafee, for the respondents.

[Counsel referred to:—Workmen's Compensation Act, 1906, sch. 1, clause 3; *Osborne* v. *Tralee and Dingle Railway Co.* (1); *Bevan* v. *Energlyn Colliery Co.* (2); *M'Dermott* v. *Owners of S.S. Tintoretto* (3); *Bullen* v. *London United Tramways* (4); *Brandy* v. *Owners of S.S. Raphael* (5).]

(1) [1913] 2 I. R. 133.
(2) 5 Butt. 169.
(3) [1911] A. C. 35.
(4) 8 Minton-Senhouse W. C. C. 103.
(5) [1911] 1 K. B. 376.

O'Brien L.C. :—

The material facts in the present case which raise the net point at issue are few.

The applicant was employed at the Dundrum Lunatic Asylum at a weekly wage of £1 18*s*. He was injured by an accident arising out of and in the course of his employment. Various questions were raised, but the only material one is this :—

By the terms of his employment the workman was entitled, under the Civil Service rules which regulated this establishment, upon the legal termination of his employment to receive a pension. This pension is of course a payment in the nature of a recompense or remuneration for the work performed during the period of active employment. While it is paid out of public funds, the real position of such an allowance appears to me to be, that either the pension which any particular man gets is governed by a general actuarial scheme by which portion of the remuneration is kept back so as to provide a fund for future pensions, or that it is to be regarded as a right to receive payment after the actual period of employment has ceased, this right of payment being earned and acquired under the contract of service by the work done during the period of service. The pension is something that has been earned in the past, and not something that is given in the future apart from the work performed by him in the past.

It would be a singular state of the law that if a workman by his industry and prudence provided, let us say, a policy of assurance against accident, or an annuity for himself by savings out of his earnings, that the policy or the annuity should be taken as prejudicially affecting the sums which would become lawfully payable to him as the result of injuries sustained by him and arising out of and in the course of his employment; and I cannot see that it would not be equally unjust if by reason of his contract he earns for himself this future pension that he is really to be deprived in the whole or in part of the benefits of the Act by reason of his having earned this pension.

It would really come to this, that in every case where a workman has earned and become entitled to his pension, when

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his contract or employment was terminated by reason of an accident, the pension would become not a source of benefit to him, but a source of indemnity to the employer.

Take the simple figures in the present case, and see how unjust the contention put forward against this man is:—His weekly salary was £1 18*s.*; half this would be 19*s.*; he would obtain (though of course not necessarily) this as a maximum compensation under the statute. He was entitled to a pension of 8*s.* 6*d.* a week; he is awarded 9*s.* 6*d.* a week. We cannot control the learned Recorder in respect of the amount or estimation of the figures; all we can control him in is in respect of any error in the application of principles of law. The Recorder, however, has stated for us a question which I think is clearly one of law, and to which I think there is a clear answer, though it is not in accordance with the view the Recorder appears to have taken. He says:—"I awarded 9*s.* 6*d.* from the 24th of July weekly until further order. In doing so I had regard to all the proved circumstances, including the fact that the applicant has (though not the amount of it) a pension from the employment." Shortly I do not think he is entitled to take this into account at all.

Mr. Macafee, in his ingenious argument, says that the Recorder did not proceed by deducting the pension from the maximum possible allowance of 19*s.*, though indeed he admits that the figures are rather striking, but he explains this by saying that by reason of the fact that the applicant had a pension "there was evidence before the Recorder from which he could infer that the earning power of the applicant was enhanced." I must say I am unable to conceive a case in which there could be any real evidence to support such a proposition. It simply comes to this, that in arriving at the amount of compensation some deduction is to be made in respect of the pension from the amount that the workman otherwise would have been entitled to, whether it was 19*s.* or 18*s.*, or any other sum. In my opinion it cannot be done.

During the course of the argument Lord Justice Ronan referred to a Scotch case of *Gilroy* v. *Mackey* (1). It was suggested by Mr. Macafee that it should be regarded as a decision concerned only with the first part of clause 3 of the 1st schedule. I decline to cumber myself with such a distinction as that. I think the case adopts the same principle that I conceive to be the law, and at least I find it a sound help to me in strengthening me in the conclusion which otherwise I had clearly arrived at.

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(1) 2 Butt. 269.

For these reasons I am of opinion that the case should be remitted to the Recorder with a declaration that in fixing the amount of the weekly compensation under schedule 1, clause 3, he was not entitled to take into account or have regard to the fact that the applicant was in receipt of a pension from the Asylum authorities.

Moriarty L.J. :—

I concur. The pension itself must not be taken into account in determining the amount of compensation that ought to be awarded under the Workmen's Compensation Act, 1906. It is not a "payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." These are the words of the first part of the third clause of the First Schedule. To hold that the pension could be taken into account would be a most calamitous thing, for in fact it would be penalising the workman who by his prudence had saved money out of his earnings. For that reason the pension does not come within the first part of clause 3. Mr. Macafee in the course of his argument suggested that the learned Recorder in fixing the compensation did not, in fact, deduct the amount of the pension from the sum that he considered the applicant would, apart from the pension, be entitled to. He says that it was proved before the Recorder, or at least put forward in argument, that the fact that the applicant had a pension was a circumstance that put him in a better position to contract in the labour market, and that the learned Recorder was entitled to take that into account in arriving at the amount of compensation he should award. To that contention of Mr. Macafee's, all I can say is, that if there were evidence to support it, I might not dissent from it; but that is, provided I were told the particular circumstance which put the workman in a better position to place his services in the labour market, and provided also

I could consider it to be a circumstance that could be legitimately taken into account. Mr. Macafee has suggested that there could be evidence to show that by reason of the workman having a pension he was in a better position to contract for higher wages as regards future employment. I do not exclude the possibility of such a thing, though if I were sitting as a judge of fact I should find myself very sceptical about it. However, in the present case there is not a particle of evidence to support such a proposition, and consequently when the learned Recorder refers to the proved circumstances of the case, he certainly could not include the pension or its effect. I am entirely in agreement with the Lord Chancellor that the case be sent back to the Recorder with a direction that in fixing the amount of the compensation the pension should not be taken into account.

RONAN L.J.:—

I confess I do not understand the statement in the note of the learned Recorder, "I had regard to all the proved circumstances, including the fact that the applicant has (though not the amount of it) a pension from the employment." It means at all events that he did not deal with the case as if there was *no* pension. He held apparently that it was immaterial whether the pension was £1 per annum or £100, but that he "had regard" to the fact that there was "a pension."

I asked Mr. Macafee how it could affect the amount awarded. He said that it might be considered that a man with a pension was in a better position to contract in the labour market. But (1) this depends on the amount of the pension, and (2) there was no evidence on the subject whatever.

The Act is an Act for "Compensation to Workmen for Injuries." The financial position of the workman does not affect the amount. His private means from any source outside the wages he can earn do not diminish his right to compensation.

Mr. Macafee admitted that this pension was not "a payment allowance or benefit which the workman may receive from the employer" within the meaning of schedule 1, clause 3, of the Act.

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I must read the Recorder's statement as meaning that the pension was an element in estimating the amount of the compensation. It certainly did not increase it, therefore it diminished it. In my opinion it should not have been taken into account at all, and he should not have "had regard" to it.

Solicitor for the applicant: *James R. Creswell.*

Solicitor for the respondent: *The Treasury Solicitor.*

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1915.

May 11, 18.
June 8, 9, 10, 11, 14.
July 26.

Appeal.
1915.

Nov. 25, 26, 29, 30.

1916.

Feb. 3, 21.

JOHN MACKEY *v.* JAMES HENRY MONKS (PRESTON), LIMITED (1).

Ship—Factory—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 84, 104—*Regulations of Secretary of State imposing Obligations of Owner of Ship—Ultra Vires—Power of Court to question Validity of Regulations—Fatal Accident—Negligence.*

Section 79 of the Factory and Workshop Act, 1901, provides that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in factories is dangerous to life or limb, he may certify it to be dangerous, and thereupon may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable, and to meet the necessity of the case. By sect. 84 the regulations are to be laid before both Houses of Parliament, and if either House within forty days resolve that all or any of the regulations ought to be annulled, the regulations shall, after the date of the resolution, be of no effect, without prejudice to the validity of anything done in the meantime thereunder. Sect. 104, sub-s. 1, enacts that the provisions of the Act with respect to (inter alia) dangerous trades "shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupiers of the premises; and for the purpose of the enforcement of these provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof, and the person so using such machinery or plant shall be deemed to be the occupier of a factory." Sub-s. 2 enacts that for the purposes of the section the expression "plant" includes any gangway or ladder used by any person to load, unload, or coal a ship.

The Secretary of State, purporting to act under the powers conferred on him by the statute, had certified the processes of loading and unloading any ship in any dock, harbour, or canal to be dangerous, and had in the year 1904 made regulations which provided that it should be the duty of the owner, master, or officer in charge of a ship to comply with Part II of the regulations.

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(1) In the King's Bench Division, before Cherry L.C.J., Palles C.B., and Gibson J.

One of the Regulations in Part II provided that if a ship was lying at a wharf or quay for the purpose of loading or unloading, there should be means of access for the use of persons employed at such times as they have to pass from the ship to the shore, or from the shore to the ship, as follows:—Where a gangway is reasonably practicable, a gangway not less than twenty-two inches wide, properly secured and fenced.

The defendants were the owners of a ship lying in a river and discharging a cargo at a quay. The plaintiff brought an action against the defendants under the Fatal Accidents Act, 1846, claiming damages arising from the negligence and breach of statutory duty of the defendants in not providing proper means of access to the defendants' ship, whereby the plaintiff's son was killed. The deceased had been hired by a stevedore employed by the consignees of the cargo to unload the ship, and was drowned in the course of the unloading. Access to the ship from the quay was by means of a ladder, admittedly in a dangerous position when the accident occurred. The jury found that it was reasonably practicable to employ a gangway as a means of access from the shore to the ship; that the cause of the death of the deceased was the non-user of a gangway in accordance with the statutory requirements; that the direct cause of the occurrence was the neglect of the defendants to provide a reasonably secure and safe means of access to the ship; and they assessed damages for the loss sustained by the plaintiff.

Held, by the Court of Appeal, affirming the decision of the King's Bench Division (Palles C.B. and Gibson J.; Cherry L.C.J. dissenting), that the regulation in question imposing obligations on the owner of a ship was ultra vires and void, and that the defendants were entitled to judgment.

Held, also, that it was competent for the Court to question the validity of the regulations.

Institute of Patent Agents v. *Lockwood*, [1894] A. C. 347, distinguished.

Motions by the plaintiff for judgment, and by the defendants for judgment or a new trial.

The action was brought by the plaintiff under the Fatal Accidents Act, 1846. The statement of claim set out as follows:—

The plaintiff as parent and sole dependant of John Mackey, deceased, brings this action on his own behalf as having suffered damage from the negligence and breach of statutory duty of the defendant company, its agents and servants, in not providing proper means of access to the defendants' steamship "Aletta," whereby the said John Mackey was killed at Waterford on the 27th March, 1914.

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Particulars of the negligence and breach of statutory duty are as follows:—

1. On the 27th day of March, 1914, the deceased, John Mackey, was employed in unloading coal from the defendants' steamship "Aletta," at the harbour of Waterford.

2. In pursuance of the Factory and Workshop Act, 1901, and of the regulations made thereunder, a gangway of certain specified dimensions ought to have been provided by the defendants as the means of access of persons employed in unloading the said ship; such a gangway would have been reasonably practicable under the circumstances. In further pursuance of the said regulations the means of access so provided ought to have been efficiently lighted, as the process of unloading the ship was being carried on between one hour after sunset and one hour before sunrise.

3. On the night of the 27th March, 1914, the only means of access from the defendants' steamship "Aletta" to the wharf was a narrow, frail ladder, unfenced, and not secured or made fast in any way either to the ship or to the wharf. Furthermore, this ladder was not lighted in any way.

4. The deceased, John Mackey, when attempting to pass from the wharf to the ship about 11 o'clock on the said night, in consequence of the negligence and breach of statutory duty of the defendants in not providing proper means of access, and of the defective lighting of the means of access provided, fell off the said ladder into the sea, and was drowned.

Particulars pursuant to the statute are as follows:—Name of the person on whose behalf the action is brought: the plaintiff. The nature of the claim in respect of which damages are sought: The said John Mackey, deceased, was a coalporter in the employment of Messrs. McCullagh, Limited, and was earning £1 5*s.* a week, of which he gave about 10*s.* a week to the plaintiff, and by his death the plaintiff has lost his main support and means of living.

The plaintiff claims £1000.

The defendants in their defence denied that a gangway as alleged in paragraph 2 of the statement of claim ought to have been provided by them, or that they were guilty of any statutory breach of duty in relation thereto, and denied that such a

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gangway was reasonably practicable under the circumstances. They denied that they were guilty of any negligence or breach of duty as alleged in paragraph 4, or at all. They traversed the other allegations in the statement of claim, and also pleaded contributory negligence on the part of the deceased. The defence further stated that the defendants would object that in so far as the plaintiff's claim was based upon an alleged breach of statutory duty, it disclosed no cause of action against the defendants, inasmuch as the breaches of duty complained of were the subject-matter of penalties provided by the Factory and Workshop Act, 1901, and that such penalties excluded any other claim.

The plaintiff in his reply pleaded that if there was any contributory negligence on the part of the deceased (which was denied) it could have been avoided by the exercise of ordinary care, and by the performance of their statutory duty by the defendants.

The action was tried before Madden J. and a special jury of the County of the City of Waterford on the 4th and 5th March, 1915. The following matters were proved or admitted :—

On the 27th March, 1914, the defendants' vessel the "Aletta," a steamship of 336 tons gross registered tonnage, was lying in the river at Waterford, and being discharged of a cargo of coal at a wharf known as M'Cullagh's wharf. Messrs. McCullagh were the consignees of the cargo. The deceased was not employed by the defendants, but was one of a gang of dock labourers hired by a stevedore named Keogh, who was employed by Messrs. McCullagh, the consignees, to discharge the cargo. The vessel was being unloaded at both sides; on the side of the quay by cranes on the wharf, on the other side into lighters. The deceased was employed on the quay unloading on to the wharf, and the men of this gang went on board and ashore by means of a ladder, one end of which rested on the vessel, and the other on the wharf; neither end of the ladder was fastened. At low tide, the vessel being below the wharf, the ladder was in an upright position in relation to the vessel's deck, and was a perfectly safe means of access; but at high tide the ladder assumed a horizontal position, and the men had to cross it on hands and knees—admittedly a dangerous proceeding. There was a gangway on board the vessel, but this was not used till after the accident.

About 11 o'clock at night on the 27th March, the men of the wharf gang were returning to work after going on shore for refreshment. The ladder was then in a horizontal position. The deceased was the last man of the gang to return; he was quite sober, and when last seen was within a step of the ladder. A splash was heard, and someone cried, "A man in the water." What appeared to be a man's coat was seen six or eight feet down the river, and bubbles were seen, according to one witness directly under the ladder, according to another six or eight feet down the river. The tide was then ebbing. Mackey's body was recovered down the river three days after the accident. The wharf was well lighted.

Evidence was given on behalf of the plaintiff that there was no difficulty in employing a gangway at any state of the tide. The defendants' witnesses stated that it was not reasonably practicable to employ a gangway owing to the motion caused by the tide, and also to the fact that the vessel was discharging at both sides.

The plaintiff, who was sixty-two years of age, had been supported by the deceased.

A copy of the Regulations, dated the 24th October, 1904, made by the Secretary of State, under the Factory and Workshop Act, 1901, was entered.

The following are the material portions of the regulations (1):—

"Whereas the processes of loading, unloading, moving, and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading, and coaling any ship in any dock, harbour, or canal have been certified, in pursuance of section 79 of the Factory and Workshop Act, 1901, to be dangerous, I hereby, in pursuance of the powers conferred on me by that Act, make the following regulations for the protection of persons employed in the processes or in any of them, and direct that they shall apply to all docks, wharves, quays, and ships as aforesaid.

"These regulations shall come into force on the 1st January, 1905. . . . ."

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(1) These regulations are set out in the Statutory Rules and Orders (1904), p. 146.

"DUTIES."

. . . . "It shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II of these regulations."

"Part II.—4. If a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling, there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship, as follows:—

"(*a*) Where a gangway is reasonably practicable, a gangway not less than 22 inches wide, properly secured, and fenced throughout on each side to a clear height of 2 feet 9 inches by means of upper and lower rails, taut ropes or chains, or by other equally safe means. (*b*) In other cases a secure ladder of adequate length.

"Provided that nothing in this regulation shall be held to apply to cargo stages or cargo gangways, if other proper means of access is provided in conformity with these regulations.

"Provided that, as regards any sailing vessel not exceeding 250 tons nett registered tonnage and any steam vessel not exceeding 150 tons gross registered tonnage this regulation shall not apply if and while the conditions are such that it is possible without undue risk to pass to and from the ship without the aid of any special appliances."

"7. When the processes are being carried on between one hour after sunset and one hour before sunrise (*a*) the places in the hold and on the decks where work is being carried on, and (*b*) the means of access provided in pursuance of regulations 4 and 5, shall be efficiently lighted, due regard being had to the safety of the ship and cargo, of all persons employed, and of the navigation of other vessels, and to the duly approved bye-laws or regulations of any authority having power by statute to make bye-laws or regulations subject to approval by some other authority."

"Part VI.—24. If the persons whose duty it is to comply with regulations 4, 5, and 7 fail so to do, then it shall also be the duty of the employers of the persons employed, for whose use the means of access and the lights are required, to comply with the said regulations within the shortest time reasonably practicable after such failure."

At the close of the plaintiff's case, Batttersby K.C., for the defendants, applied for a direction. He subsequently handed in a formal requisition in the following terms :—"I respectfully ask your Lordship for a direction on the following grounds :—(1) That there is no evidence that John Mackey, deceased, fell from the ladder; (2) that there is no evidence of any breach of a statutory duty by the defendants; (3) that, even assuming a breach of statutory duty by the defendants, no cause of action is shown against them, the sole remedy being the penalty imposed by the Factory and Workshop Act, 1901; (4) that no cause of action for negligence at common law is shown, on the principle of *volenti non fit injuria.*"

The report of Madden J., after referring to the requisition of Battersby K.C., went on to say :—"He was proceeding to argue the case, when I said that as I was obliged to leave for Clonmel on that afternoon, time would not permit of a full argument, and that I would take the verdict of the jury on the questions of fact involved in the case, and leave the parties to move as they might be advised. He asked me to take a note of the cases on which he relied, which included *Wakelin* v. *London and South-Western Railway Co.* (1), *Marshall* v. *Owner 'Wild Rose'* (2), *Groves* v. *Lord Wimborne* (3)."

The following were the questions submitted to the jury, and their answers thereto :—

"1. Was it reasonably practicable to employ a gangway as a means of access from the shore to the ship?" Answer, "Yes."

"2. Was the ladder employed secure and reasonably safe for the purpose?" Answer, "No."

"3. Was it at the time of the occurrence so placed as to be a safe means of access?" Answer, "No."

"4. Was the death of Mackey the result of a fall from the ladder?" Answer, "Yes."

"5. Was the proximate and direct cause of the death of Mackey the non-user of a gangway in accordance with the statutory requirements?" Answer, "Yes."

"6. Was the proximate and direct cause of the occurrence the

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(1) 12 A. C. 41.
(2) [1910] A. C. 486.
(3) [1898] 2 Q. B. 402.

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neglect of the defendants to provide a reasonably secure and safe means of access to the ship?" Answer, "Yes."

"7. Did the defendants supply a gangway suitable to be employed by those in charge of the vessel?" Answer, "Yes."

"8. Was the plaintiff dependent on the earnings of the deceased?" Answer, "Yes."

"9. If so, assess damages for the loss sustained by him by reason of his son's death?" Answer, "£270."

The judge abstained from giving judgment, leaving the parties to move as they should be advised. He stated in his report that the pleadings were to be taken as amended on both sides, so as to support the questions left to the jury.

The following are the principal sections of the Factory and Workshops Act, 1901 (1 Ed. VII, c. 22), material to the case:—

Section 79:—"Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

Section 82:—"(1) The regulations made under the foregoing provisions of this Act may apply to all the factories and workshops in which the manufacture, machinery, plant, process, or description of manual labour certified to be dangerous, is used (whether existing at the time when the regulations are made or afterwards established) or to any specified class of such factories or workshops. They may provide for the exemption of any specified class of factories or workshops either absolutely or subject to conditions."

Section 83:—"Regulations made under the foregoing provisions of this Act may, among other things, . . . (*b*) prohibit, limit, or control the use of any material or process; and (*c*) modify or extend any special regulations for any class of factories or workshops contained in this Act."

Section 84:—"Regulations made under the foregoing provisions of the Act shall be laid as soon as possible before both Houses of Parliament, and, if either House, within the next forty days after the regulations have been laid before that House, resolve that all or any of the regulations ought to be annulled, the regulations shall, after the date of the resolution, be of no effect, without prejudice to the validity of anything done in the meantime thereunder or to the making of any new regulations. If one or more of a set of regulations are annulled, the Secretary of State may, if he thinks fit, withdraw the whole set."

Section 85:—"(1) If any occupier, owner, or manager, who is bound to observe any regulation under this Act, acts in contravention of, or fails to comply with, the regulation, he shall be liable for each offence to a fine not exceeding £10, and, in the case of a continuing offence, to a fine not exceeding £2 for every day during which the offence continues after conviction therefor. (2) If any person, other than an occupier, owner, or manager, who is bound to observe any regulation under this Act, acts in contravention of, or fails to comply with, the regulation, he shall be liable for each offence to a fine not exceeding £2, and the occupier of the factory or workshop shall also be liable to a fine not exceeding £10, unless he proves he has taken all reasonable means by publishing, and to the best of his power enforcing, the regulations to prevent the contravention or non-compliance."

Section 104:—"(1) The provisions of this Act with respect to—(i.) Power to make orders as to dangerous machines (s. 17); (ii.) Accidents; (iii.) Regulations for dangerous trades; (iv.) Powers of inspectors (s. 119); and (v.) Fines in case of death or injury (s. 136), shall have effect as if every dock, wharf, quay and warehouse and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour or canal were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises; and for the purpose of the enforcement of these provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof and the person so using any such machinery or plant shall be deemed to be the occupier of a factory. (2) For the purposes of this section the expression 'plant' includes any gangway or ladder used by any person employed to load unload or coal a ship, and the expressions 'ship' and 'harbour' have the same meaning as in the Merchant Shipping Act, 1894" (1).

Section 136:—"If any person is killed or dies or suffers any bodily injury or injury to health, in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding £100, and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than £1 for each offence; and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise, as the Secretary of State determines: Provided as follows:—(*a*) In the case of injury to health the occupier shall not be liable under this section, unless the injury was caused directly by the neglect: (*b*) The occupier shall not be liable to fine under this section if an information against him for not observing the provision or regulation to the breach of which the death or injury was attributable has been heard and dismissed previous to the time when the death or injury was inflicted."

De Renzy K.C. (with him *Lupton* and *George O'Brien*) for the plaintiff:—

The grounds relied on in the defendants' notice of motion can be ranged under five heads: (1) that the verdict was against the weight of evidence; (2) that there was misdirection; (3) the defence of *volenti non fit injuria*; (4) that the statutory penalty is the only remedy; and (5) that there was no common law obligation on the defendants to provide safe access.

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(1) These definitions are as follows:—

s. 742. "Ship" includes every description of vessel used in navigation not propelled by oars.

"Harbour" includes harbours, properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works in or at which ships can obtain shelter, or ship and unship goods or passengers.

1. The first head is a matter of fact, involving the question, did Mackey fall from the ladder? Mackey was last seen at the foot of the ladder; there was a splash in the water, and a cry, "A man in the water." Bubbles and a man's coat were seen in the water near the ship. From these facts the jury were entitled to infer that Mackey fell into the water from the ladder. That inference is no greater than that which the jury drew, and which was held rightly drawn, in *Smith* v. *London and South-Western Railway Co.* (1).

2. As regards the misdirection, the defendants' contentions are involved in the other heads.

3. The defence of *volenti non fit injuria* cannot be raised in an action for breach of statutory duty: *Baddeley* v. *Earl Granville* (2). On the common law claim the defence rests on fact, and where the defendant neither submits nor asks to be put to the jury a question on it, he cannot get a new trial, because there has been no finding: *per* Wills J. in *Osborne* v. *London and North-Western Railway Co.* (3); *Smith* v. *Baker* (4); and the judgments of A. L. Smith L.J. and Romer L.J. in *Williams* v. *Birmingham Battery and Metal Co.* (5).

4. The Factory and Workshop Act, 1878 (41 & 42 Vict., c. 16), in sect. 82 contained provisions similar to those in sect. 136 of the Act of 1901. In *Groves* v. *Lord Wimborne* (6), decided on the Act of 1878, the same point as to penalties being the exclusive remedy was argued (p. 404), and that argument was dealt with by A. L. Smith L.J. in his judgment at p. 408, where, after stating that it seemed to him that the fine was inflicted by way of punishment on the employer, he said: "This consideration and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family, lead me to the conclusion that it cannot have been the intention of the Legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the prima facie right of the workman to be fully

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(1) L. R. 6 C. P. 14.

(2) 19 Q. B. D. 423.

(3) 21 Q. B. D. 220, at p. 224.

(4) [1891] A. C. 325.

(5) [1899] 2 Q. B. 338, at pp. 344, 345.

(6) [1898] 2 Q. B. 402.

compensated for injury occasioned to him by the neglect." Rigby L.J. uses similar language in his judgment at p. 414.

5. There is an obligation at common law to compensate the injured person. Here the evidence shows that Mackey's death was caused by a fall from the ladder, and that that was caused by the negligence of the defendants' servants in not affording a safe means of access. There was no question of *volenti non fit injuria* submitted, and the jury have found that it was not Mackey's contributory negligence which caused the accident. [He referred to *Smith* v. *London and South-Western Railway Company* (1); *King* v. *Great Western Railway Company* (2); *Elliott* v. *Hall* (3); *Mowbray* v. *Merryweather* (4).]

Battersby K.C. and *Gibson K.C.* (with them *Swayne*), for the defendants:—

There is no cause of action where the statute provides for penalties. The penalties are the exclusive remedy: *Norton* v. *Kearon* (5); *Vallance* v. *Falle* (6); *Doe d. Rochester* v. *Bridges* (7); *Wake* v. *Mayor of Sheffield* (8).

The regulations without qualification are ultra vires, that is, so far as they throw the duty on the owner of the ship: Maxwell on Statutes, p. 83; *Seal* v. *Alexander* (9); *Institute of Patent Agents* v. *Lockwood* (10). Under sect. 136 of the Factory and Workshop Act, 1901, the "occupier" alone is liable to the penalty in case of death. The statute protects workmen in the employment of the occupier of the factory: *Francis* v. *Turner Brothers* (11). "The 'occupier' is the person who runs the factory and controls the work, and is responsible for the fulfilment of the provisions of the Act": per Lord MacLaren in *Ramsay* v. *Mackie* (12). The ship is not a factory within the meaning of the Act: *Flowers* v. *Chambers* (13); *Bartell* v. *Gray* (14); *Houlder Line* v. *Griffin* (15),

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(1) L. R. 6 C. P. 14.
(2) 24 L. T. (N. S.) 583.
(3) 15 Q. B. D. 315.
(4) [1895] 1 Q. B. 857; 2 Q. B. 640.
(5) I. R. 6 C. L. 126.
(6) 13 Q. B. D. 109.
(7) 1 B. & Ad., at p. 859.
(8) 12 Q. B. D., at p. 145.
(9) [1912] 1 K. B., at p. 476.
(10) [1894] A. C. 347.
(11) [1900] 1 Q. B. 478.
(12) [1904] 7 Fraser 106, at p. 109.
(13) [1899] 2 Q. B. 142.
(14) [1902] 1 K. B. 225.
(15) [1905] A. C. 220.

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followed and commented on in *Smith* v. *Standard Company* (1), and followed in *Morgan* v. *Tydvil Engineering Company* (2). The headnote in *Bartell* v. *Gray* (3) is inaccurate: *Harrison* v. *Oceanic Steam Navigation Company* (4). *Bartell* v. *Gray* (3) was followed in *Weavings* v. *Kirk* (5). Possession by the shipowner is not inconsistent with the use of the ship by someone else: *Bartell* v. *Gray* (6). The occupier of the factory could only be the person using the machinery, etc., in the process of unloading. The plaintiff could have recovered against Keogh, the stevedore: *Biddle* v. *Hart* (7); *Mowbray* v. *Merryweather* (8); or against McCullagh: *Carrington* v. *Bannister* (9); *Woodham* v. *Atlantic Transport Company* (10); *Marney* v. *Scott* (11).

The defendants can take this point now on a motion for judgment: *Chilton* v. *Corporation of London* (12).

George O'Brien, in reply:—

Section 79 directs that the Secretary of State may make such regulations as are in his opinion necessary, and section 84 directs the regulations to be laid before both Houses of Parliament. If not annulled by a resolution of either House, this Court cannot question the validity of the regulations: *Institute of Patent Agents* v. *Lockwood* (13).

The power of the Secretary of State is unlimited; he is enabled by the statute to declare anything a factory, and to impose the obligations of the Act on any person, where he considers it reasonably necessary to prevent the danger.

Cur. adv. vult.

GIBSON J.:—

This action relates to breach of statutory and common law duty, which, though in character distinct, were treated at the trial as if what would prove the former would also establish the latter.

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(1) [1906] 2 K. B. 275.
(2) 98 L. T. (N. S.) 762.
(3) [1902] 1 K. B. 225.
(4) [1907] 2 K. B. 420.
(5) [1904] 1 K. B. 213.
(6) [1902] 1 K. B. 225, at p. 231.
(7) [1907] 1 K. B. 649.
(8) [1895] 1 Q. B. 857.
(9) [1901] 1 K. B. 20.
(10) [1899] 1 Q. B. 15.
(11) [1899] 1 Q. B. 986.
(12) 7 Ch. D., at p. 740.
(13) [1894] A. C. 347.

I shall first consider the statutory aspect of the case, to which the argument was mainly addressed. The question raised is important and new, lying outside the numerous authorities cited on both sides.

The "Aletta," owned by the defendants, a limited company, a vessel 150 feet long, with one hatch, of draught not specified, arrived at Waterford on March 27th, and proceeded at once to discharge at M'Cullagh's Wharf. It is admitted that M'Cullagh's company were the consignees, and that Keogh was their stevedore, employed to effect the unloading. Several important matters were not proved:—the bill of lading or contract between the ship and the consignees; the contract between the stevedore and the men (of whom Mackey was one); the method of discharge; the presence of machinery for unloading on board; the control and disposition of the gangway and ladder; and the ownership or occupation of the wharf, which was probably possessed by the consignees. It would seem that the entire operation was carried out by Keogh, cranes on the wharf being employed for the purpose of the landward discharge. The gangway and ladder were apparently for access only, and not for conveyance of the cargo.

About 10.30 p.m., when some twenty-four tons remained in the hold, the stevedore's men left the vessel for refreshment, and in half an hour returned to resume work, getting on board by a ladder, then placed in a horizontal position, which had to be crossed on hands and knees—admittedly a dangerous operation. Mackey was hindmost of the party, and when last seen, following the others, he was within a step of the ladder. A splash was heard; this gave the alarm; there was no cry. Bubbles and a coat were seen under or a few yards away from the ladder. The tide was then ebbing; how long does not appear. Mackey was quite sober. His apparent object being to return with his comrades, the dangerous character of the ladder as a means of passage, and the situation of the coat and bubbles, make the inference of fall from the ladder more probable than suicide or fall from the wharf, which was well lighted, or from the ship after he had got on board. A gangway was at once put out; the level or gradient is not stated. This fact proves that it was then a practicable means of access; may explain why the ladder was laid horizontally;

and shows what was thought instantly as the probable or possible cause of the accident. In *Proctor's Case* (1), and *Kerr's Case* (2), the inference was much more difficult.

This question of fact, which I decide against the defendants, relates to the entire action in both its aspects. Another question of fact—the alleged unauthorized interference with the position of the ladder—refers rather to the common law cause of action, to be considered later on. If the use of a gangway was practicable and commanded by the regulations, the omission to supply such access in breach of statutory obligation might be properly considered the cause of the misfortune.

The main contention of defendants' counsel was that—(*a*) The regulations were in excess of the statutory powers given by the Act of 1901, c. 22; (*b*) that if the regulations were valid, they were not infringed. A vast number of cases were cited in argument, many only remotely bearing on the point before us. Without classification and attention to their sequence in point of time, the decisions perplex and confuse rather than assist. I put them aside for the present, and proceed to examine the legislation, in interpreting which it is necessary to have before us (*a*) the recognized mercantile law; (*b*) the statute law in force when the Act of 1901 was passed.

In the absence of special contract or custom, the discharge of a vessel is a joint operation in which the shipowner and charterer or consignee each has independent duties, the former taking the goods to the ship's rail, where the latter receives them: Abbott on Shipping, ed. 1901, p. 569. The shipowner's duty does not extend beyond the vessel; when he has brought the cargo within reach of the consignee, his function is at an end: *Petersen* v. *Freebody* (3). The general law is stated in Lord Halsbury's Laws of England, "Shipping," sections 563, 564, 565. The books supply examples of various methods of discharging; the consignee may undertake the entire process, or the shipowner may do so: *Merrill* v. *Wilson* (4); the discharge may be into lighters, as in *Stevens* v. *General Steam Navigation Co.* (5); or the ship's part of the work may be done by its own stevedore or crew. *Langham S. S. Co.* v. *Gallagher* (1) (where the division of labour is described at p. 352). *Union Steamship Co.* v. *Claridge* (2) ; *Budgett* v. *Binnington* (3), illustrate the normal duties of the respective parties. I have not found any book or case suggesting that the Act of 1901 has transferred, in every case, irrespective of the contract of shipment, to the shipowner, part of the charterer's obligation as to discharge.

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(1) T. L. R., 25th June, 1915. Since reported [1916] A. C. 464.

(2) [1915] A. C. 215.

(3) [1895] 2 Q. B., at p. 297.

(4) [1901] 1 Q. B. 35.

(5) [1903] 1 K. B. 890.

I now turn to the development of the factory legislation. The principal Act, 1878, c. 16, defines factories in much the same way as the Act of 1901. Substantially, with a few special exceptions, the duty and liability are imposed on the occupier: sections 6, 81, 82, 86, 87. The statute of 1891, c. 75, in sections 8 to 12 (made applicable by sect. 23 of the Act of 1895, c. 37), authorizes special rules and special measures to secure safety. These, clearly, affect the occupiers only, and sect. 7 (as to fire escapes, a structural matter) imposes expressly the duty, there prescribed, on the owner, who is made responsible, notwithstanding any agreement with the occupier.

The Act of 1895, c. 37, deals with duties of occupiers in case of accidents: sects. 18 and 20. Sect. 23 enables special rules to be made under the sections of the enactment of 1891, as if certain places and persons were factories and occupiers of factories. It was on this section that the amending provisions of the Act of 1901 were based. Most of the decisions which have given rise to so much misconception refer to sect. 23 in connexion with the Compensation Act of 1897. The regulations under this section are confined to occupiers, like those under the Act of 1891. "Owner" is expressly substituted for "occupier" in sect. 24, sub-sects. 1, 4, and 5. Section 25 is to the like effect. A stevedore employed by a consignee to discharge at a wharf was occupier of the wharf: *Merrill* v. *Wilson* (4), *Stuart* v. *Nixon* (5), and had also a quasi-occupation of the vessel so far as was necessary for his duty: *Bartell* v. *Gray* (6); *Weavings* v. *Kirk* (7). So a ship discharging by its own stevedore had a special use or occupation of the wharf, and became, in that way, subject to factory responsibility: *Handford's Case* (1).

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(1) [1911] 2 I. R. 348.
(2) [1894] A. C. 185.
(3) [1891] 1 Q. B. 35.
(4) [1901] 1 K. B. 35.
(5) [1901] A. C. 79.
(6) [1902] 1 K. B., at p. 232.
(7) [1904] 1 K. B., at p. 217.

When Parliament set about amending the legislation in 1901, the occupier, whether of the solid structures or of the machinery or plant used in discharging, alone was within reach of regulations. It was only when the owner was expressly substituted for the occupier that he was subject to factory obligations. Who the occupier was is described in sect. 23 of the Act of 1895, which is, in this respect, identical with sect. 104 of the Act of 1901. Section 25 is described as a definition section in *Carrington* v. *Bannister* (2).

The same distinction is rigorously observed in the Act of 1901; the persons of "owner" and "occupier" are nowhere confounded. Section 2, sub-sect. 3 (a sanitary provision like sect. 110 of the Public Health Act, 1878, c. 52), refers to owner or occupier, a collocation not again occurring. Section 7, sub-sect. 4, enables the occupier to make a particular kind of claim against the owner. Section 14, sub-sect. 2 (like sect. 7 of the Act of 1891), puts the responsibility on the owner, notwithstanding any agreement with the occupier, but with a modified claim against the occupier under sub-sect. 4. Sections 87, 88, and 142 make the owner instead of the occupier responsible. In some sections the occupier is expressly named. It was not, however, necessary to do this generally; where a factory was "not kept in conformity with the Act"—a phrase of constant occurrence in the legislation—the occupier alone, in the absence of express provision otherwise, is the person answerable: sects. 135, 136, 137.

Section 79 confers on the minister an absolute power of certifying as to machinery, plant, or process being dangerous, but it restricts his authority as to regulations by the words, "subject to the provisions of this Act," which deprive his regulations of the statutory efficacy enjoyed by orders made under sect. 65 of the Act of 1878, dealing with a special subject; though, in any view, no regulations could have the effect of displacing or repealing special statutory provisions—a matter discussed in recent

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(1) [1907] 2 K. B., at pp. 414, 415.

(2) [1901] 1 Q. B., at p. 23.

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cases. Section 79 occurs in Part IV, as to dangerous and unhealthy industries. Sections 73 to 78 deal with occupiers only. The provisions as to dangerous trades are contained in sections 79 to 86.

Section 82, sub-sect. 3, makes regulations override agreements. The authority in sub-sect. 2 to impose duties on occupiers of a particular class and owners, would indicate that occupiers, where owners are expressly made responsible, could not otherwise have been reached. Under sect. 85 regulations may prohibit, limit, or control the use of any material or process, and may modify or extend any special regulations for any class of factories. Those provisions are unnecessary if the wide effect contended for by the plaintiff is given to sect. 79. Section 85 deals with occupiers (named first because they are, save in special cases, the class made liable), owners (named in sects. 88 and 142 as the persons liable), and managers, who represent their principals. Sub-sect. 2, referring to employees and others bound to obey the regulations, puts the final duty on the occupiers, who, and who only, are given a special limited protection here, and by sect. 141 which is similar to sect. 87 of the Act of 1878. The duty in respect of regulations under sect. 86 only affects occupiers who, *ex necessitate rei*, alone could perform it.

Section 104 applies five sets of provisions contained in the Act to the new subject-matter and the new class of occupiers described in the section. Four of these provisions—as to dangerous machines, sect. 17; as to accidents, sects. 19 to 23; as to inspectors, sect. 119; and as to death or injury, sect. 136—refer to occupiers only. The question is whether the provision as to regulations for dangerous trades is similarly restricted, as the principle *noscitur a sociis* would indicate. On the context, which describes particular persons deemed to be occupiers, it would seem that the regulations should be confined to them. The section may be considered in three parts, which for convenience I call A, B, and C. A describes what is the artificial factory, and it is in this part that the amendments of sect. 23 of the Act of 1891 are noticeable. The process need no longer be to or from the wharf, &c., and the introduction of "ship" (which includes every description of navigating vessel not propelled by oars), and "harbour" (which includes a navigable river), brings discharge into lighters within factory liabilities. The four solid structures are of themselves deemed to be factories. The machinery or plant used in the process described is only a factory when used. The ship is not contemplated as being itself a factory, as the solid structures are. The effect of the amendment is seen by comparing *Stevens* v. *General Steam Navigation Company* (1) with *Stuart* v. *Nixon* (2), and *Merrill* v. *Wilson* (3) (as to the gangway there used, see pp. 41, 43). Though not itself a factory, if the ship uses the wharf for the purpose of discharge, then, so far as the space there is occupied, it is subject to factory obligations; and if it uses machinery or plant in the process, as such machinery or plant, itself a factory (*Stuart* v. *Nixon* (2)), must have a base, the ship so far as it is a foundation and casing of the machinery may be regarded as subject to the enactment. B and C refer to persons: B makes the person who, by himself or his employees, uses such machinery or plant for the purpose described, occupier "of the premises," an expression which in sect. 23 meant the solid structures: *Houlder's Case* (4). "Temporarily," found in sect. 23, is omitted, probably for a reason supplied by *Carrington* v. *Bannister* (5). C deals with two kinds of persons: first, the person having the actual use of the solid structure; secondly, the person "so using" (the word "actual" is not repeated, but is included in "so") any such machinery or plant; and such person is deemed to be occupier of a factory. The word "use" here indicates use of the kind discussed in so many recent cases: *Thompson* v. *City Glass Bottle Co.* (6), and connotes control. A consignee's stevedore would have such use of the wharf and the plant required for discharge, which by contract he might be obliged to provide, just as in case of discharge into lighters.

Sections 105 and 106, not mentioned in argument, support the view that the regulations must be restricted to occupiers. The former deals with buildings; the latter with railway sidings. Each section, as regards the extension of the special provisions and as to regulations, is identical with section 104. It would be quite impossible to read these sections as authorizing the minister to put the burthen on a rack-rent landlord, who could have no voice in the way his lessees or sub-lessees choose to use the demised premises. Of course, no such regulation would, in fact, be made; but the point is, could it be? According to the plaintiff's argument the owner could be saddled with the duty if the Secretary of State thinks proper. In my opinion, the person who enjoys actual use is, as occupier, the only one whom the regulations can affect.

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(1) [1903] 1 K. B. 890.
(2) [1901] A. C. 79.
(3) [1901] 1 K. B. 35.
(4) [1905] A. C., at p. 224.
(5) [1901] 1 Q. B. 20.
(6) [1902] 1 K. B. 233.

I now take up some special difficulties. There may be three factories—1. The solid structures which are themselves factories: *Willmott* v. *Paton* (1); *Green* v. *Britten* (2). 2. A vessel using internal machinery or plant to discharge, so far as it can be regarded as a necessary part of such machinery. 3. The machinery or plant used between the wharf and the vessel, which latter may not be a factory, though the wharf always is. It is the existence of the machinery or plant in use in the process as an objective fact that constitutes such machinery or plant a factory. The person actually using, whoever he may be, is the occupier of such factory.

Does the statute authorize regulations commanding what may be the creation of a factory between factories with different occupiers, or between a wharf factory and what may not be a factory till the gangway extension is established? A consignee's stevedore occupying the wharf factory might, not unreasonably, be required to elongate that factory to the ship by a gangway. So, if the ship was itself a factory and was discharging by its own stevedore, it might be asked to bear a similar duty. But this factory plant is a curious species of plant, ambiguous or semi-aquatic in character, part on land, and part over water and on the ship afloat, intermittent in existence according to the water level, and replaced, whenever the tide falls, by a ladder which takes its place as a factory. Though notionally a factory, a gangway has, as such, no independent factory existence; it is only a link in the process of discharge.

Assuming that the creation of such intermediate factory between shore and ship can be ordered, as I assume, can the regulation, in addition to prescribing that a gangway shall be the means of access, direct (1) by whom it is to be provided, whether occupier or not? (2) who is to be responsible for its use, whether occupier or not? (3) that a person is to be deemed occupier not within the statutory description?

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(1) [1902] 1 K. B. 237.

(2) [1904] 1 K. B., p. 354.

With regard to fixed machinery worked by mechanical power, such as is contemplated in the definition of "factory" in sect. 149 (as to which see *Willmott* v. *Paton* (1), *Wrigley* v. *Bagley* (2)), the objection to putting the duty on the owner would not be quite so striking; but in the case of movable plant, such as a gangway, the only relation of which to the unloading vessel may be that the latter supports it at one end, and where the consignee's stevedore, already in occupation of the wharf, a factory by itself, is to use or occupy the gangway to fulfil his employer's contract and his own, the difficulty is acute. To test the entire situation I will, further on, give as an example a concrete case of not unfamiliar occurrence, as to which, if the regulations are ultra vires, they must fail altogether. The difficulty is immensely increased if the shipowner has not only to supply a gangway for the stevedore, but to see that it is always, where practicable, used. Here there was a suitable gangway, and hence the plaintiff insists that the owner was responsible for its use. It appears to me that the Minister cannot by regulations transfer or shift the obligation imposed on the defined occupier or owner respectively. If he cannot substitute the occupier for the owner under sect. 88 (which the express inclusion of "occupier" in sect. 82 proves), and in other sections naming the owner, he is equally incompetent to transfer responsibility from the occupier to the owner, or from the defined occupier to some one not answering the definition. "Owner" is defined; "occupier" is not, save in sect. 104: *Carrington* v. *Bannister* (3). In a passage quoted in Lord Halsbury, "Factories," sect. 1033, p. 447, Lord McLaren says the occupier is the person who runs the factory, controls the work, "and is responsible for the fulfilment of the provisions of the Act within it." I agree with this. The plan of the factory legislation is, save in a few cases where otherwise specially provided, to make the occupier liable for performance of the duty. Who the occupier may be under sect. 104 is a question of fact depending on the particular circumstances. This cannot be predetermined beforehand by a definition without regard to contract or circumstances.

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(1) [1902] 1 K. B. 237.
(2) [1901] 1 K. B. 780.
(3) [1901] 1 Q. B. 20.

A further difficulty now presents itself. What does "owner" in the regulations mean? The word is the subject of an inelastic definition, which, literally, is inappropriate to a ship under sect. 104, though it would fit sections 105 and 106, which similarly authorize regulations. Construed *cy-pres*, it may describe the owner most nearly resembling a rack-rent landlord. In factory regulations should not the term be read rather in the factory sense than in the shipping sense, such as we find in sect. 71 of the Merchant Shipping Act, 1906, c. 48, where, in reference to limitation of liability, "owner" includes any charterer to whom a ship is demised? In the regulations "occupier" is distinguished from "owner." If "owner" in the regulations means "occupying owner," why was not that stated? If "owner" describes one who may not be occupier of the vessel, the monstrous result inevitably follows that an owner who had by demise parted with all control over the vessel, crew, and voyage, would be answerable penally and civilly for the charterer's default, even in the case of coaling, a matter for the latter's exclusive benefit. The Act warrants nothing of the kind.

Again, the benefit given by sect. 141 and the burden created by sect. 136 are confined to occupiers. If the owner is substituted for the occupier, he loses the benefit and bears a burden thrown on the occupier. It would be manifestly unjust and absurd that the occupier should have to pay for the default of an owner on whom the primary duty was placed.

The regulations of 1904 were based on the mistaken view that a ship in a certain situation was itself a factory. The misconception was not unnatural, and was excused by many judicial utterances of a misleading character. The cases may be ranged in different classes, according as they refer to contractors for repairs, discharge by the consignee's stevedore, or by the ship's stevedore. They may also be considered in reference to the particular statute before the Court, and to date. In *Houlder's Case* (1) (after the regulations), and in the cases explaining and following it, *Smith's Case* (2), *Burdon's Case* (3), *Handford's Case* (4), and *Harrison's Case* (5), the mistake was corrected, and it must be taken as now settled that a ship, as such, is not a factory, like a wharf, though if a shipowner uses a wharf or machinery for discharge, he is, in relation to the wharf or machinery so occupied or used, deemed to be in the position of a factory occupier: *Handford's Case* (6). The value of the decisions, whether against stevedores or others, is that all treat the person in immediate occupation as the person answerable. I can discover no authority suggesting that a person not an occupier in the statutory sense can be converted into an occupier by regulation or otherwise. Up to the present no book or case indicates that the course of ordinary commercial practice has been changed. The regulations now come up for consideration for the first time.

The concrete case which I use as a test is this. It is not unlike that before us, so far as the evidence goes. A consignee, by his contract with the ship, is bound to carry out the entire discharge from the hold to the wharf or into lighters, and employs for that purpose a stevedore who is to supply men and appliances. The vessel may be a sailing vessel without internal machinery for discharge, mechanical or otherwise: *Willmott* v. *Paton* (7). The stevedore occupies the wharf and the vessel so far as necessary to enable him to do his work: *Bartell* v. *Gray* (8), and *Weavings* v. *Kirk* (9). Would the regulation in reference to such case be ultra vires? If it would be, it is ultra vires altogether, just as, in applying the rule against perpetuities, the decision is based on what the language of the instrument covers, irrespective of the particular event; or, in case of by-laws, where unreasonableness depends, not on the facts of the individual case, but on the unreasonableness of the by-law in its general application. The regulations purport to be universal, exhaustive, and without

(1) [1905] A. C. 220.
(2) [1906] 2 K. B. 275.
(3) [1906] 2 K. B. 275.
(4) [1907] 2 K. B. 409.
(5) [1907] 2 K. B. 420.
(6) [1907] 2 K. B. 409, at pp. 414, 415.
(7) [1902] 1 K. B. 237.
(8) [1902] 1 K. B. 225.
(9) [1904] 1 K. B. 213.

exception of any kind; and, imposing in every state of fact an unqualified duty on persons who may be outside the statutory provisions, they are beyond what the enactment authorizes.

To summarize my reasons for rejecting the plaintiff's construction of sect. 79, according to which the Minister is given powers superseding the special statutory provisions:—

1. Section 79, as the other sections show, deals with processes and methods, but does not enable the incidence of the duty, whether placed by the statute on the occupier or owner, to be altered. Processes, especially in the case of movable machinery or plant, are within the exclusive control of the immediate occupier. Sections 82, 83, and 86 indicate that the occupier is the person subjected to the regulations, save where otherwise stated. "Plant" includes anything used in the process—picks, shovels, horses: *Yarmouth* v. *France* (1), a decision on the Employers' Liability Act, 1880, c. 42, where the expression is "machinery or plant connected with or used in the business." The duty in respect of plant devolves, obviously, on the person actually engaged in the process.

2. Sections 104, 105, and 106 extend in identical terms the five sets of provisions therein enumerated to the subject-matter described in those sections. In sections 105 and 106 the regulations are clearly confined to occupiers. The context of section 104, with its definition of occupier, must be similarly limited.

3. The regulations authorized by section 23 of the Act of 1895, which defines occupier in the same terms as section 104, refer to occupiers only, as the sections of the Act of 1891 thereby made applicable show; sections 23 and 104 are special definitions of the artificial occupier: Lord Halsbury, "Factories"; *Carrington* v. *Bannister* (2).

4. A consignee's stevedore, bound by contract or mercantile custom to take delivery from the ship's rail, where the process is to a wharf, is, in respect of such wharf, in actual use of what is in all circumstances deemed a factory, and, having such actual use, he is the person designated to supply the factory extension by gangway. The fact that the ship is by contract or licence to

(1) 19 Q. B. D. 647.

(2) [1901] 1 Q. B. 20.

support the gangway at one end does not convert it into a factory compellable to provide and control the use of such gangway, which the stevedore alone is to use. Such ship, if it has discharging machinery or plant, such as described in *Langham S. S. Co.* v. *Gallagher* (1), may be, within its own limits, subject, in respect of such machinery or plant, to factory obligation; but a ship however small is within the statute, and may not possess such machinery or plant. Whether it does or not, unlike the wharf, of which the factory character is absolute, its responsibility depends on actual use, and where such use is by some one outside the vessel, the owner is not contemplated as liable.

5. The definition in section 104 of occupier as the person "so using," that is, actually using, involves an inquiry into the question of fact to be ascertained from the particular contract and circumstances. A regulation cannot set aside the definition and supersede the necessity of such inquiry by fixing on the ship, whether itself a factory or not, the duty in every case. Even therefore, if "owner" in the regulation is read "occupying owner," the statutory authority would be exceeded.

6. If "owner" in this factory legislation includes an owner not in occupation (as where the ship was demised) which, possibly the result of oversight, the context, specifically referring to occupiers as liable under other regulations, may indicate, and such owner is within the regulations, this owner would be answerable for the charterer's fault—a result so absurd and unjust that it would require the clearest expression of intention in the Act to justify. *Lex non cogit ad impossibilia.* Section 104, so far from warranting any such view, points clearly the other way.

7. The difficulties arising on sect. 85, sub-sect. 2, and ss. 135, 136, and 141, above discussed, are weighty arguments against the plaintiff's contention. *Expressum facit cessare tacitum.* Regulations cannot displace or supersede the explicit affirmative provisions of these sections.

8. Plain and unmistakable language is required to produce such a fundamental change in established mercantile law and in the course of legislation as the plaintiff's contention demands.

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(1) [1911] 2 I. R., at p. 352.

There is no hint in any text-book or case that anyone not possessing control and use is liable.

9. An owner, not an employer, could not be an undertaker within the compensation legislation of 1897, though one of the objects of the Act of 1901 was to enlarge the employee's rights: *Stevens' Case* (1). That an occupying owner might, in certain circumstances, be liable as well as the direct employer was assumed in *Wrigley* v. *Bagley* (2), though the actual decision was, on the facts, adverse to the claimant. Can the Minister by regulation make the owner "undertaker," though not within the statutory description of "occupier"? Regulation 24 makes the employer secondarily responsible, the primary duty being thrown on the owner. This seems to invert the relation between the parties, at least where the stevedore employer is in actual use of the machinery or plant.

10. The regulations of 1904 were framed on the mistaken assumption that, just as a wharf was always *per se* a factory, so a ship, loading, unloading, or coaling in the place described, was *per se* a factory, and, therefore, amenable to all factory regulations, though such ship, as has since been decided, is only so subject when particular conditions exist.

If the regulations were intra vires, the verdict finding that they were violated was right. Regulation 4 imposes an absolute duty, not only to have, but (on the plaintiff's construction) also to use, a gangway under the prescribed conditions. This obligation as to use is onerous: *Toronto Power Co.* v. *Paskwan* (3), but on this branch of the case, I adopt the plaintiff's interpretation, which is necessary for his success, as a suitable gangway was, in fact, provided; the complaint is, that it was not used. On this view the owner was bound to comply with the regulation as to use at his peril. He is responsible, as principal, for his agents; and, as he is hardly ever on board, and, in case of a company, never, he is not excused by the fault being that of the master or mate. The word "or," on which the defendants' argument rests, occurs frequently in analogous legislation, e.g. The Merchant Shipping

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(1) [1903] 1 K. B. 890.

(2) [1901] 1 Q. B. 780.

(3) [1915] A. C., at p. 738.

Act, 1854, c. 104, sect. 147; The Merchant Shipping Act, 1894, c. 60, sects. 220 and 442; the Act of 1906, c. 48, sect. 21. In some sections the liability is on the owner in fault: Act of 1894, c. 60, sect. 432; Act of 1906, c. 48, sect. 10. Section 104 of the Act of 1901 speaks of machinery or plant. Sect. 85, sub-s. 2, and sect. 141, show that an occupier may be liable for the defaults of his staff. *Watkins* v. *Naval Colliery Co.* (1), decided on the Act of 1887, c. 58, sects. 16 and 59, is a direct authority (see speeches of Lord Haldane at p. 703, and of Lord Atkinson at pp. 706, 707). *Armitage* v. *Nicholson* (2) is to the like effect; see also Coal Mines Act, 1911, c. 50, and *Atkinson* v. *Shaw* (3).

The argument that, as penal liability is imposed, personal default only is contemplated, is of no weight. The absolute duty cannot be got rid of by delegation: *Fitzgerald* v. *Hosford* (4); *Department of Agriculture* v. *Burke* (5). Even if the occupier could not be fined, his civil liability would remain unaffected: *Watkins* v. *Naval Colliery Co.* (6). Section 141, confined to occupiers, does not help defendants. It does not protect against breaches of absolute obligation; though for offences and civil proceedings where the duty is qualified it may give a defence: *Butler* v. *Fife Coal Co.* (7).

The penalty does not affect the civil remedy: *Butler* v. *Fife Coal Co.* (7).

The principle *volenti non fit injuria*, it was conceded, does not apply where a statutory obligation is infringed.

It was assumed that contributory negligence might be relied on in such case, though it would be no answer to a prosecution: *Blenkinsop* v. *Ogden* (8). The defence is more connected with the common law cause of action to be next considered. I abstain from any opinion on the point save this, that where (as here) contributory negligence is merely *volenti non fit injuria* in another shape, it must fall within the same principle. Beyond Mackey's going across the ladder, there is no evidence of contributory negligence, and the jury have found that the cause of the accident was the absence of a gangway.

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(1) [1912] A. C. 693.

(2) 29 T. L. R. 425.

(3) [1915] 2 K. B. 768.

(4) [1900] 2 I. R. 391.

(5) [1915] 2 I. R. 128.

(6) [1912] A. C., at pp. 703, 706, 707.

(7) [1912] A. C. 149.

(8) [1898] 1 Q. B. 783.

It would seem that the gangway and ladder were for ingress and egress of the men, and not for carrying out the cargo, apparently operated on by cranes. What machinery, if any, was in the ship, we know not. In *Merrill* v. *Wilson* (1) it was held that a gangway so used where the ship was unloading overside was not within section 23 of the Act of 1895; sect. 104, is, however, different. No argument was directed to the point; and I shall assume that the regulation applies to a gangway used as a means of passage only to a ship discharging. The regulation refers to cargo vessels.

Being of opinion that the statutory cause of action fails, the regulations being ultra vires, I am obliged to consider the alternative common law claim.

The two causes of action were blended together, and it was assumed that evidence which would prove the breach of statutory obligation would be sufficient to establish common law liability. Even if the evidence and findings might, taken alone, warrant a verdict, I should feel great difficulty in allowing the present verdict to stand. The second branch of Regulation 4 directs the use of a ladder where a gangway is not practicable. Some of the questions as to the ladder may relate to this alternative. The sixth question, mainly relied on, would probably be understood as covering all the statutory obligations. "Neglect" adds nothing; it only imports omission of duty. The facts founding the duty must be established. There is no finding that Mackey (who was not a trespasser) was an invitee or licensee (with quite different rights), or that the ladder, as adjusted, was a trap, or that, if it was, the defendants set or were liable for it. The defendants were under no duty to have a gangway as means of access, and Mackey knew that he was crossing by a ladder. It was essential for the plaintiff to keep the two heads of complaint distinct and rigidly apart, the questions on the statute being in one compartment, those on common law duty being in another. Had this been done, the infirmity of proof and the insufficiency of the findings would have been at once apparent. The statutory duty was absolute;

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(1) [1901] 1 Q. B. 35.

Gibson J.

the common law duty would arise only under special conditions. The findings and evidence assume that the defendants were under a duty to supply Mackey with a safe means of access of the kind prescribed by the regulations.

I have, at the beginning of my judgment, specified the points not proved, peculiarly material to this branch of the case—the contract with the ship and the stevedore (on which Mackey's character as licensee or invitee depends); whether the stevedore in any way controlled the use of the gangway or ladder; who altered the position of the ladder; whether the ship accepted liability for means of access which, at common law, the stevedore would be bound to supply; what were the special facts entitling Mackey, as against the ship, to a safe means of entry and exit. On the evidence the defendants were entitled to a direction on this cause of action, which was treated as of minor importance, the case being substantially rested on the regulations.

As to *volenti non fit injuria* and contributory negligence, both usually but not necessarily for the jury's consideration, but not asked to be submitted to the jury, and the former not pleaded, it is not necessary to say anything, as I think no cause of action was established. Nor do I speculate whether on proper evidence a possible cause of action might not have been made out. On both aspects of the case there should be verdict and judgment for the defendants.

PALLES C.B.:—

I agree with my brother Gibson that the regulations of the Secretary of State of the 24th October, 1904, so far as they purport to impose a duty upon the owner, master, or officer in charge of a ship lying at a wharf or quay for the purpose of unloading, to have a gangway from shore to ship for the use of the persons employed are ultra vires the power conferred upon the Secretary of State by sect. 79 of the Factory and Workshop Act, 1901, and consequently void, and that in this action, which is brought against an owner for injuries caused by alleged breach of that duty, the verdict and judgment should be entered for the defendants upon the statutory breach.

After the luminous judgment to this effect which we have just heard, it will not be necessary for me to say very much, save to express my concurrence in the result arrived at; but as the Court is not unanimous, I desire to express the mode by which I have arrived at that conclusion.

The question depends upon the true construction of the 79th and 104th sections of the Act, but it is impossible to arrive at that construction by confining ourselves to the consideration of those sections alone. We must take them as part of one uniform whole, and fit them as best we can into the legislation of which they form parts.

The Act of 1901 is one to consolidate, with amendments, the Factory and Workshop Acts. The object of these Acts is to regulate the working of factories and workshops, and they impose a vast number of regulations in respect of such working, including many as to health and safety of the persons employed, and, in particular, several in respect of dangerous and unhealthy industries.

As the working of a factory or workshop is usually, indeed invariably, carried on by the occupiers of the factory or workshop whose working it is which is controlled by the statutory regulations, the greater number of these regulations affect and impose duties upon the occupier as distinguished from the owner, and consequently there are but few provisions in the Act which in terms refer to the owner. He is mentioned in section 7 (of which the object is ventilation); in section 14, with reference to fire escapes; in sections 87 and 88, which apply to tenement factories; and in section 142, which relates to machines in a factory moved by steam, water, or other mechanical power, of which the owner or hirer is some person other than the occupier of the factory. By these, and possibly by some other sections, duties are expressly imposed upon the owner of a factory in contradistinction to the occupier. There is also, by sect. 68, a duty thrown upon the parent in respect of the education of a child who is working in a factory, and possibly there may be some other duties cast upon persons other than occupiers. It is, however, sufficient to say that no duty of the class sought to be imposed by the impeached regulations is thrown by the Act on anyone, so that the question here must be determined upon the general scope of the Act, which contemplates duties upon the occupier.

The duties imposed by the vast majority of the provisions, other than those I have mentioned, are thrown upon the occupier; and sect. 104 of the Act, by defining occupier as the person answering a certain description mentioned in the section, treats the duty as one of a class for which the occupier can by regulation be made liable. It is material to observe the mode by which liability of the occupier is declared by the Act. It is by prescribing in several sections the measures which are to be taken in the factory for attaining certain desired results, without in words referring to owner, occupier, or other person as the person who is to take those measures, but by adding to each section a provision that a factory in which there is any contravention of that particular provision shall be deemed "not to be kept in conformity with this Act." See as examples sect. 6, as to temperature, and sect. 9, as to sanitary conveniences. There are then two comprehensive provisions in sects. 135 and 137, by the first of which, if a factory "be not kept in conformity with this Act," the occupier thereof shall be liable to a fine not exceeding £10, and by the second of which the occupier is declared liable to a fine if a person is employed in the factory contrary to the provisions of the Act.

This being the general scheme of the Act, the section which gives the Secretary of State the power to make regulations is the 79th.

It is contained in Part IV of the Act, the heading of which is "Dangerous and Unhealthy Industries," and is the opening section of a sub-division of that part, headed, "Regulations for Dangerous Trades." It enacts that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in factories or workshops, is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous, and thereupon he may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

This is a very general power. I do not treat the words, "subject to the provisions of the Act," as very important, as to my mind words to this effect are implied in every provision in a statute, and my conclusion should have been the same had these words been omitted. If there be a certificate of the Secretary of State, as there is here, and the subject-matter be within the matter by the section deputed to him, the power of the Secretary of State is in respect of that subject-matter unlimited. He is the sole judge of whether the regulations he makes are reasonably practicable and whether they meet the circumstances of the case. In relation to these matters he is substituted for Parliament itself. It is necessary, however, here to consider what exactly is the matter by this section deputed to the Secretary of State. It is easy to see that the thing in the manufacture or process which is dangerous and ought to be and can be omitted, and the thing which can and ought to be substituted for the omitted thing, are matters for his consideration; but it is a wholly different thing whether he is to determine the person who is to omit the one thing and to substitute the other. Prima facie the omission must be the act of him engaged in the manufacture or process, a person who must be the servant of the occupier, and therefore legally the occupier himself. It could not be contended that the duty to omit a particular process or to substitute another for it could, by regulations, be imposed upon an utter stranger. There must be some limitation as to the person upon whom the duty of doing or omitting to do the things prescribed by the regulations to be done or omitted is to be imposed. What is that limitation? That is the problem; that is the matter for our decision.

Before attempting to solve it I shall pass from the general to the particular; to do so will help us to solve the general proposition. For this purpose I must apply the 79th section, which relates exclusively to matters in connexion with factories and workshops, to that with which the impeached regulations deal, the unloading of ships. This purpose is effected by sect. 104, which is in Part V of the Act, a part which is headed, "Special modifications and extensions." That part is divided into seven sub-divisions, of which sect. 104 constitutes the fifth, which is headed, "Docks." It enacts that "the provisions of this Act with respect to, inter alia, (iii) 'regulations for dangerous trades'" (which includes sect. 79) "shall have effect as if every dock, wharf, quay, and warehouse and all machinery and plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process," and then follow two provisions of much moment, viz., (1) "and as if the person who by himself, his agents or workmen uses any machinery or plant for the before-mentioned purpose were the occupier of the premises"; (2) "and for the purpose of the enforcement of these provisions the person having the actual occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof and the person so using any such machinery or plant shall be deemed to be the occupier of a factory.". By sub-s. 2 of this section the expression "plant" is, for the purposes of the section, directed to include any gangway or ladder used by any person employed to load or unload or coal a ship.

Reading sect. 79 in connexion with sect. 104, it would appear to me unquestionable that if the Secretary of State were satisfied that the process of unloading a ship at a quay were dangerous, he might certify that fact, and thereupon he might make regulations, if it appeared to him reasonably practicable and to meet the necessity of such case. Part of the regulations here were that when a ship is lying at a quay for the purpose of unloading there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship, as follows:—"Where a gangway is reasonably practicable a gangway," describing it as in regulation 4 (*a*).

The process so certified would be a process or description of manual labour used in a factory, as both quay and gangway are factories, and if it were that the stevedore or his men were using the gangway in the course of and for the purpose of the discharge, a question would at once arise upon which it is not necessary to express an opinion, whether under these circumstances the Act itself, not the regulation, did not impose the prescribed duty on the stevedore.

The real question here is, is it within the jurisdiction of the Secretary of State to make the part of the regulation which prescribes "it shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II of these regulations."

On this question that part of the 104th section which enacts that "for the purpose of the enforcement of these provisions" certain defined persons "shall be deemed to be the occupier of a factory," should be considered. I deem these words of great moment, because, in my view, they were essential to a valid regulation in respect of matters within this 104th section. I am of opinion that for reasons partly already given, partly hereinafter mentioned, the liability to perform the duty prescribed by clause 4 (*a*) of the regulations is by the Act cast upon the occupier of the factory and only upon him, but it also supports my view as to the absence of jurisdiction in the Secretary of State to determine the person on whom the duty should be cast. Why was it necessary to enact that the persons described should be deemed the occupiers of a factory? Plainly because Parliament intended that these persons should become liable to perform the duty, and as the Secretary of State had no power to designate the person to perform the duty, and as, if words (such as if the regulation was not complied with the factory should be deemed not to be kept in conformity with the Act) were used in the regulation, the Act itself would impose the duty on the occupier of the factory, all that was required to effectuate the intention was to enact that which has in fact been enacted, that these persons should be deemed "occupiers of a factory." The Secretary of State had no power to do this, as he was without jurisdiction to determine the person to perform the duty, and therefore this had to be effected by the Act itself. Therefore these words inserted in the Act are words which would have been useless if the person on whom the duty was to be imposed was to be determined by the regulation of the Secretary of State, and not prescribed by the Act.

Looking to the history of factory legislation, the genesis of this 79th section appears to be the still unrepealed sections 8 to 10 of the Factory and Workshop Act, 1891, of which sect. 79 appears to be an alteration and an extension. By these sections, when the Secretary of State gives such certificate as is mentioned in sect. 79 of the Act of 1901, the chief inspector may serve on *the* *occupier of the factory* a notice in writing either proposing such special rules, or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable, and to meet the necessities of the case. Unless the occupier serves notice of objection within twenty-one days the rules are to be established, or the requirement is to be observed. If there be objection which is not assented to by the Secretary of State, the matter in difference is to be referred to an arbitration, which by the rules of the first schedule is expressed to be one between the occupier of the factory on the one part, and the chief inspector on behalf of the Secretary of State on the other.

Then the effect of the special rules when established is prescribed by sect. 9. "If any person who is bound to observe any special rules . . . acts in contravention of or fails to comply" with them he is subjected on summary conviction to a fine not exceeding £2, and the occupier of the factory is made liable to a fine not exceeding £10, unless he prove that he had taken all reasonable means by publishing, and to the best of his power enforcing, the rules to prevent the contravention or non-compliance, and a factory in which there is a contravention of any requirement under the Act is to be deemed not kept in conformity with the principal Act (i.e., the Factory and Workshop Act of 1878), under the 78th section of which the occupier becomes liable to a fine not exceeding forty shillings.

These sections are very similar to sect. 79 and the following sections of the Act of 1901, the difference between them being that the Act of 1901 substitutes the order of the Secretary of State for the award of the arbitrator under the Act of 1891, and the fact that the only party on whom notice is prescribed to be served is the occupier of the factory is strong to show that the resulting duty was one to be imposed on him and him alone.

It is necessary now to advert again to the words of sect. 79. If the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in a factory is dangerous or injurious to health, or dangerous to life or limb, he may make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case. For the reasons given, in my opinion these words authorize regulations prescribing the things to be done or omitted, not the persons by whom they are to be done or omitted. As to a thing to be omitted in a process used in a factory, it necessarily must be omitted by the person using the process, *i.e.*, the occupier; as to a thing to be done in that process, prima facie at least, the persons using that process must do it; but, be this so or not, I am of opinion that the greatest effect which can be attributed to a regulation made by the Secretary of State within this power is the same as if a section in the same words had been inserted in the statute directing the doing or the omission of the thing, not the person to do or omit it; and that the liability or duty thereby created is to be ascertained, not from the regulation, but from the Act as if it had been amended by introduction therein of the direction to do or omit to do the thing which the Secretary of State deems reasonable and to meet the necessity of the case.

The liabilities and duties of a ship and consignee of cargo, and a stevedore in respect of unloading cargo, are part of the commercial law of this country. The ship is to bring the cargo to the ship's rail and no further. The owner's duties to the men employed by the ship, and to the stevedore and his men, are well settled. Without clear, strong, and coercive words I could not hold that this well-known branch of the law, hallowed by the wisdom of ages, was to be left to the mercy of a Secretary of State instructed by a chief inspector of factories. I should require much clearer words than we have here. I consider that the 104th section in very words designates the person to be liable by stating that certain persons, including "the person so using such machinery or plant," shall be deemed the occupier of a factory.

In my opinion the only liability which can arise from a regulation under sect. 79 and sect. 104 is one on the occupier, or (if the matter in respect of which it is made is one of those exceptional cases in which by the Act the liability is thrown upon the owner or some other person, then) upon the owner of the factory or such other person; but I read the decision of the House of Lords in *The Houlder Line* v. *Griffin* (1) as a decision that a ship is not a factory, and that the owner of a ship under the circumstances contemplated by the regulation is not the owner of a factory. The facts found do not, in my opinion, establish any common law liability on the defendants.

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(1) [1905] A.C. 220.

The verdict and judgment should, I think, be entered for the defendants.

Cherry L.C.J.:—

I regret that I cannot concur in the elaborate and learned judgments which have just been delivered; and as the case is one of great importance, I feel bound to state, as briefly as possible, my reasons for holding that the plaintiff is entitled to have judgment entered for him.

This is an action brought under Lord Campbell's Act by the plaintiff, as parent and sole dependant of John Mackey, deceased, who was drowned in the river at Waterford on the 27th March, 1914, owing, it is alleged, to the negligence of the defendants and breach of statutory duty by them.

The facts of the case are few and simple, and there is little controversy in regard to them. It appears that the ship "Aletta," of which the defendants are the owners, was being discharged of a cargo of coal at the quay at Waterford, within the limits of the harbour of Waterford, but not in a dock, canal, or confined space. The deceased man was not in the employment of the defendants, but was hired by a stevedore named Keogh, who had contracted for the unloading of the vessel. The vessel was provided with a gangway, which, however, was not made use of; and the workmen engaged in discharging the vessel used a ladder instead of the gangway for going on board and ashore. When the tide was low this ladder was in upright position and perfectly safe, but when the tide was high it was brought into a horizontal position, and those using it had to crawl on hands and knees over it in a most dangerous manner.

The deceased man, with others engaged in the discharge of the vessel, had come on shore late in the evening for rest and food, and was returning to the vessel for night work. The deceased when passing from the quay to the vessel fell into the water and was drowned. There is some controversy as to whether or not he was on the ladder (then in a horizontal position) when the accident occurred, but the jury have found that his death was the result of a fall from the ladder.

The principal cause of action relied upon by the plaintiff is the alleged breach by the defendants of regulations made by the Home Secretary under the Factory and Workshop Act, 1901, with respect to the loading and unloading of ships "in any dock, harbour, or canal." These regulations, which were made on the 24th October, 1904, have now been in force for over ten years, and, so far as I am aware, their legality has never been questioned. They provide (Part II, No. 4) that "if a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling, there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship as follows:—(*a*) where a gangway is reasonably practicable, a gangway not less than twenty-two inches wide, properly secured, and fenced throughout on each side to a clear height of two feet nine inches by means of upper and lower rails, taut ropes or chains, or by other equally safe means; (*b*) in other cases a secure ladder of adequate length." The regulations further provide that "it shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II of these regulations." Part II includes that regulation to which I have referred.

The findings of the jury in answer to the questions submitted to them by the learned judge clearly establish that these regulations were not complied with, and that the death of the deceased was due to such non-compliance. The learned judge, however, having regard to the legal objections raised by the defendants' counsel, refused to enter judgment for either side, and both have moved for judgment accordingly. The plaintiff relies upon the findings of the jury and the statutory regulations. The defendants, on three grounds, ask to have judgment entered for them notwithstanding the findings of the jury. (1) They say that there is no evidence to sustain the finding of the jury that the death of the deceased was caused by a fall from the ladder; (2) that the regulations relied upon must be read distributively, and that the only duty imposed upon the defendants, who are the owners of the ship, is to provide a proper gangway, which they did;

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that the duty of placing the gangway in position did not lie upon them, but on the master or officer in charge of the ship; and that they are not liable for the default of the master or officer in charge in not obeying the statutory regulation; (3) they say, also, that the regulation is ultra vires, in so far as it purports to apply (*a*) to the owners of the ship, who cannot be dealt with as occupiers of a factory; (*b*) to persons who are not in the service of the defendants, but of a stevedore who is an independent contractor; and (*c*) to a ship, which cannot be dealt with as a "factory" within the Factory and Workshop Act, 1901.

As regards the first point, I think that there was ample evidence to sustain the finding of the jury that the death of the deceased was due to a fall from the ladder. It was proved that the ladder was the means invariably used for going on board or ashore; that the deceased was seen within a few feet of it, on the occasion of the accident, walking towards it; and that his body was seen in the water immediately under it. It is clear to me, therefore, that there was abundant evidence to sustain the finding of the jury. Even if there was not, it must be remembered that the real negligence relied upon is the omission to provide the gangway, and if, owing to its absence, the deceased was compelled to go aboard in some dangerous way, such as stepping across to the gunwale, a cause of action will equally arise in his favour.

The next ground relied upon by the defendants is more serious, namely, that the regulation should be read distributively; that the sole duty cast upon the owner of a ship is to provide a gangway, and that the duty of seeing that the gangway is used rests only on the master or officer in charge of a ship. This construction is supported by the use of the disjunctive "or" in place of the conjunctive "and" in connecting the three parties named. The objection to it is, that if it be adopted, there is nothing in the regulation itself to show what part of the duties imposed is cast upon each of the parties named, and the division itself can only be made by guesswork. This is, to my mind, a fatal objection as regards the imposition of duties which are to be enforced by a penalty, and I therefore come to the conclusion that the regulation must be read cumulatively, as imposing upon each of the parties named the duties prescribed. I think, also, that in this respect the owner of a ship would be liable for the default of his servant, the master or officer in charge of the ship, as he would be in a common law action of negligence.

I come now to the most serious question raised in this case, viz., the argument that the regulation itself is ultra vires and cannot be enforced. That question depends upon the construction of certain sections of the Factory and Workshop Act, 1901, to which I must refer, and upon the construction of which I regret to say that the Court is divided. The grounds upon which, as I understand the arguments of defendants' counsel, it is contended that the regulations are ultra vires, are threefold. First, it is said that the power of making regulations for dangerous trades conferred by section 79 of the Factory and Workshop Act, 1901, is confined to making regulations prescribing the conditions and manner in which the particular trade dealt with is to be carried on, and does not extend to indicating the persons who are to be responsible for carrying the regulations themselves into effect; that the Act itself indicates upon whom alone the duty is cast, and that the owner of a ship cannot be deemed to be an "occupier" of a factory within the meaning of the section which extends the Act to docks, wharves, quays, and warehouses used in the process of loading and unloading ships (sect. 104).

I admit at once the force of this argument, supported as it is by the powerful reasons given in the judgments of my Lord Chief Baron and Gibson J., but I cannot think that Parliament intended so to limit the powers of the Secretary of State when making regulations. The very general words used in sect. 79 seem to me to indicate the contrary intention. The section provides that the Secretary of State, if satisfied that any manufacture, machinery, or plant is dangerous or injurious to health, "may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case." The extreme generality of these words seems to me to indicate that the Legislature intended to confer powers of a most general character, and as far as possible to avoid questions as to whether the regulations made were within the power conferred or not. The words "subject to the provisions of this Act," appear to me only to mean that nothing contained in the regulations is to contradict provisions of the Act. If consistent with the Act and within the general scope, they are, in my opinion, in all cases to be given effect to as if they were part of the Act itself.

But, apart from these general considerations, it appears to me that the section of the Act which extends the power to make regulations for dangerous trades to the loading and unloading of vessels (sect. 104) itself indicates that the owner of a ship may be liable for the violation of these regulations. The concluding words of sub-s. 1 provide that "for the purpose of the enforcement of these provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse, . . . shall be deemed to be the occupier of a factory." I think that these words are wide enough to include the owner of a ship which is being discharged at a quay or wharf; and it seems to me to be a very narrow construction to confine them, as was attempted to be done in this case, to the consignee of the cargo, or the stevedore who had contracted for the unloading of the vessel according to the usual custom. At any rate there is nothing repugnant to the Act in applying it by regulations, as has been done here, to the owner of the ship. I therefore arrive at the conclusion that the regulations are not ultra vires in so far as they are made to apply to the owners of ships when being unloaded.

The second ground upon which it was contended that the regulations were ultra vires was that a ship cannot be deemed a factory within the meaning of the Act, and therefore that in so far as the regulations apply to ships they cannot be enforced. I quite agree that a ship afloat in an open river, even though moored to a quay or wharf, cannot be deemed to be a factory within the meaning of the Act; but the Act itself provides (sect. 104, sub-s. 2) that the expression "plant" includes any gangway or ladder used by any person employed to load or unload or coal a ship. In the face of this sub-section I cannot understand how it is argued that a regulation cannot be made prescribing the proper gangway or ladder to be provided for the use of persons employed in the loading or unloading of a vessel at a quay or wharf, which by the same section (sub-s. 1) is included in the word "factory."

The third ground upon which it was contended that the regulations were ultra vires was that they were made to apply to persons who were not servants of the owner of the ship, the deceased in this case being employed by a stevedore and not by the master of the ship.

I think that there is some confusion in the contention between the liability of the defendants for the breach of statutory duty and their liability for negligence at common law. To the cause of action in this case based upon the latter ground, I think that the fact that the deceased was not in the employment of the defendants is a good answer. I cannot see how there was any duty (apart from the regulations) cast upon the owner to provide a proper means of access for him to the ship or to the shore. But there is nothing, so far as I can see, to restrict the duties cast upon owners or occupiers of factories by the Factory and Workshop Act, 1901, to persons in their own employment. The duties are, in my opinion, general, and their non-observance may give rise to a good cause of action in anyone who is injured thereby.

On the whole, therefore, I have come to the conclusion that the regulations are ultra vires, and as the Court is agreed that apart from this question the plaintiff should succeed, I think that judgment should be entered for him for the amount found by the jury. As, however, the other members of the Court take a different view as regards the regulations, judgment will, of course, be entered for the defendants.

C. N. K.

The plaintiff appealed (1).

The arguments in the Court of Appeal were confined to two questions, namely—(*a*) Was it competent for the Court to question the validity of the regulations? (*b*) Were the regulations ultra vires? See concluding passage of judgment of the Lord Chancellor, *post*, p. 256.

D. J. O'Brien K.C. and *Lupton* (with them *George O'Brien*), for the appellant:—

We contend in the first place that the Court has no power to question the validity of the regulations, having regard to the very wide power given to the Secretary of State by sect. 79 of the Factory and Workshop Act, 1901, and especially to the provision in sect. 84 requiring the regulations to be laid before both Houses of Parliament, with power to either House to annul them by resolution. The regulations, not having been so annulled, have become part of the statute. An order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids: *The Queen* v. *Walker* (1), *per* Lush J. (p. 358); *Willingale* v. *Norris* (2), *per* Lord Alverstone C.J. (p. 64); *The King* v. *Harris* (3). In *Dale's Case* (4) the statute under which the rules there in question were made contained a provision as to laying the rules before both Houses of Parliament similar to that in sect. 84 of the Factory and Workshop Act, 1901, and Lord Coleridge C.J., after referring to this provision, stated (p. 398) that in his opinion, so far as the rules and orders conformed to the statute and were not inconsistent with it, they had parliamentary authority. Brett L.J., referring to the same provision says:—"Whenever that provision is introduced into an Act of Parliament, it seems to me that the rules and orders, if not objected to by Parliament, become part of the statute." In *Bailey* v. *Williamson* (5) Cockburn C.J. lays stress upon the circumstance that the statute under which the rules were made contained a provision of this kind. In *Institute of Patent Agents* v. *Lockwood* (6) the statute provided that the rules were to be laid before both Houses of Parliament for forty days, and if not annulled were to be of the same effect as if they were contained in the Act, and Lord Herschell L.C., Lord Watson, and Lord Russell held that as the rules had been laid before Parliament and not annulled, their validity could not be questioned. No doubt the statute in the present case does not provide that the rules, if not annulled, shall have the same effect as if contained in the Act, but we submit that the absence of these words is immaterial. Lord Watson at all events does not rely altogether on these words, but merely refers to them as entirely removing all doubt upon the subject. The material provision is the power of either House

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(1) In the Court of Appeal before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ.

(1) L. R. 10 Q. B. 355.
(2) [1909] 1 K. B. 57.
(3) 4 T. R. 202.
(4) 6 Q. B. D. 376.
(5) L. R. 8 Q. B. 118.
(6) [1894] A. C. 347.

of Parliament to annul the regulations. In *Reg.* (*Conyngham*) v. *Pharmaceutical Society* (1) the statute under which the rules there in question were made, the Pharmacy Act (Ireland), 1875, contained a provision that the regulations when approved by the Lord Lieutenant and Privy Council were to be of the like force and effect as if they had been enacted in the Act, and a provision that the regulations were to be laid before both Houses of Parliament, but no power was given to either House to annul them, and it was held that it was competent to the Court to question the validity of the regulations, notwithstanding that they had been approved by the Lord Lieutenant and Privy Council and laid before both Houses of Parliament. Palles C.B., distinguishing *Lockwood's Case* (2), says (p. 144)—" I am of opinion that the judgment there depended on the generality of the power, and the reservation to either House of power to proceed to annul the rules." Sect. 126 of the Factory and Workshop Act, 1901, which deals with special orders, provides by sub-s. 4 that the order shall " so far as is consistent with the tenor thereof " apply as if it formed part of the enactment. There are no such limiting words in reference to regulations made under sect. 79.

Secondly, we contend that the regulations are intra vires. The words of sect. 79 of the Factory and Workshop Act, 1901, are quite as general as those in sect. 1, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1888, upon which all the Lords in *Lockwood's Case* (2) held that the rules there in question were intra vires. The object of the statute is the protection of workmen, and the regulations were made for their protection. The effect of sect. 79 is to give the Secretary of State power to make any regulations he may think reasonably practicable and necessary to prevent injury from dangerous plant or processes, so far as such regulations do not contravene any of the provisions of the Act. There is nothing in the present regulations contravening any of these provisions. It is contended by the defendants that sect. 104 applies to occupiers only, and not to owners, but that section merely defines the occupier. There is nothing in it or in any other section confining the power of the Secretary of State to the making of regulations with respect to occupiers only. The

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(1) [1899] 2 I. R. 132.

(2) [1894] A. C. 347.

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statute deals both with owners and occupiers. Sub-s. 1 of sect. 85 contemplates owners as well as occupiers being bound by the regulations, and sub-s. 2 contemplates persons other than these being bound.

The removal of the cargo was a joint operation on the part of the stevedore, the consignees, and the shipowners; and the shipowners may be considered as persons by themselves, their agents or workmen, using the gangway, and therefore occupiers of a factory within sect. 104.

A ship may be a factory within the Act, or at all events when a ship is connected by a gangway with the quay, the ship may form part of a factory: *Bartell* v. *Gray* (1); *Handford* v. *George Clark & Co.* (2), per Cozens-Hardy M.R., at p. 414. [They also referred to *Raine* v. *Jobson & Co.* (3); *Cattermole* v. *Atlantic Transport Co.* (4).]

The statute is a remedial one, passed for the benefit of workmen. Such a statute should not be construed strictly as against workmen, but as largely as possible in their favour, and for the furtherance of the object of the Act: *Gibbs* v. *Great Western Railway Co.* (5), per Brett L.J.; Dwarris on Statutes, 2nd ed., p. 632.

Battersby K.C. and *Gibson K.C.* (with them *Swayne*), for the respondents.

The regulations are ultra vires. No power is given by the statute to impose obligations on the owner of a ship. A ship is not a factory: *Houlder Line, Limited* v. *Griffin* (6); *Handford* v. *George Clark & Co.* (2); *Harrison* v. *Oceanic Steam Navigation Co., Limited* (7). The statute is one dealing with the relation of master and servant, and, except in a few cases connected with structural matters, the obligations are throughout the statute imposed on the occupier, and not on the owner. By sect. 141 the occupier may be exempted from any fine if he proves that he has used due diligence, and brings the actual offender before the Court; and sect. 144, sub-s. 4, provides that in proceedings before a Court of summary jurisdiction with respect to an offence

(1) [1902] 1 K. B. 225.
(2) [1907] 2 K. B. 409.
(3) [1901] A. C. 404.
(4) [1902] 1 K. B. 204.
(5) 12 Q. B. D. 208, at p. 211.
(6) [1905] A. C. 220.
(7) [1907] 2 K. B. 420.

committed in a factory, the occupier, and certain relatives of his, are disqualified from acting as members of the Court. There are no such provisions as regards an owner, thus showing that he was not considered as being as a general rule liable at all. Section 104 clearly shows that the obligation was intended to be confined to the occupier. Section 79 confers no power to extend the class of persons on whom obligations are cast by the statute.

It is competent to the Court to question the validity of the regulations. In *Lockwood's Case* (1) it was not necessary to decide this point, since the rules were held to be intra vires, but the judgments of Lords Herschell, Watson, and Russell, who held that the rules could not be questioned, were based on the ground that the statute provided that the rules, if not annulled by resolution of either House, should be of the same effect as if they were contained in the Act. There is no similar provision as to regulations made under sect. 79 of the Act here in question, although there is a provision somewhat of this nature in sect. 126, dealing with special orders.

[They also referred to *R.* (*Cleeland*) v. *Pharmaceutical Society* (2); *Seal* v. *Alexander* (3); *The King* (*Crommelin*) v. *O'Neill* (4).]

O'Brien K.C., in reply.

The case was further argued on the 3rd February, 1916, when the following cases were referred to and discussed:—*Creedon* v. *Desmond* (5); *Hanlon* v. *South City Milling Co.* (6); *Fogarty* v. *Wallis & Co.* (7); *Barrett* v. *Kemp Brothers* (8); *Rex* v. *Faversham* (9); *Fazakerly* v. *Wiltshire* (10); *Reg.* v. *Lundie* (11); *Owens* v. *Campbell* (12); *Morgan* v. *Tydvil Engineering and Ship Repairing Co.* (13); *Foster* v. *Dodd* (14); *Smith* v. *Standard Steam Fishing Co.* (15).

Cur. adv. vult.

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(1) [1894] A. C. 347.
(2) [1896] 2 I. R. 368.
(3) [1912] 1 K. B. 469.
(4) [1909] 2 I. R. 379.
(5) 2 New Ir. Jur. Rep. 207.
(6) [1903] 2 I. R. 163.
(7) [1903] 2 I. R. 522.
(8) [1904] 1 K. B. 517.
(9) 8 T. R. 352.
(10) 1 Str. 462.
(11) 31 L. J. (M.C.) 157.
(12) [1904] 2 K. B. 60.
(13) 98 L. T. R. 762.
(14) L. R. 1 Q. B. 475, at pp. 485, 487; L. R. 3 Q. B. 67, at p. 75.
(15) [1906] 2 K. B. 275.

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SIR IGNATIUS J. O'BRIEN, L.C.:—

This case has stood for some time for judgment, owing to the importance of the question raised. For myself, I wished to have an opportunity of reading the very carefully considered judgments given in the King's Bench Division by Palles C.B. and Gibson J., and having done so, I am clearly of opinion that the judgment of the majority of the Court is right. I entirely adopt the view expressed by Gibson J., and his analysis of the sections of the Factory and Workshop Act, 1901.

The facts are left to some extent in doubt, but from the admissions which were made by counsel, and with the assistance of the sketch-plan which was used here, we are able to determine what are the material facts in the case.

A ship, the property of the defendants, had arrived at the quay of Waterford with a cargo of coal. The consignees had employed a stevedore named Keogh to effect the unloading of the ship. This was done by means of two cranes on the quay which were so arranged that they were able to fulfil the function of lifting the cargo from the hold of the vessel, swinging it over the rail, and depositing it on the quay. The owners of the ship had not anything to say to the discharge of the cargo, and apart from any obligations imposed on them by this statute, if they be imposed, and regulations lawfully made under it, they would not be under any liability in respect of the unfortunate accident which took place on the evening of the 27th March, 1914, and resulted in the loss of life of John Mackey, one of the stevedore's men. Mackey was totally unconnected with the ship, its owners, or officers.

The jury have found for the plaintiff, and their verdict is based on alleged neglect by the owners of the ship to fulfil obligations attempted to be imposed on them by regulations made under the provisions of the Factory and Workshop Act, 1901.

Now that Act, the regulations under which are alleged to impose this liability, deals primarily with what are defined in the statute as factories, and it imposes obligations on owners and occupiers of factories, and incidentally upon other persons, for example, doctors, who have duties to perform in connexion with factories, and parents of young children employed in factories, but everywhere throughout the statute itself we find that the statute is clear in indicating, so far as the defined class of factories is concerned, the various persons on whom obligations are imposed, from which they would be, if not altogether, at all events to a great extent, exempt by the ordinary law.

The expression "owner" is defined in sect. 156, as applied to Ireland by sect. 160, sub-s. 13, as having the meaning given to it by sect. 2 of the Public Health (Ireland) Act, 1878—an artificial definition which brings within the class of owners, not all those who in popular language would be described as owners, but only the limited class defined by reference to the receipt of profits in the shape of rent from the factory, not *quâ* factory, but *quâ* tenement.

It is, however, to be noted *in limine* that whatever under the statute may be a factory, there is one thing which *per se* is not a factory, and that is a ship. At one time indeed it was supposed to be the law that a ship was a factory, and that this had been decided in *Bartell* v. *Gray* (1), a decision upon the Workmen's Compensation Act, 1897, by sect. 7, sub-s. 2, of which Act "factory" was to have the same meaning as in the Factory and Workshop Acts. In that case a workman was injured while engaged in painting a ship in a dock, and there is a misleading head note which states that it was held that the ship was a factory within the meaning of the Act. If that head-note was right, it would very materially affect one's view of the present case, and notwithstanding the decision of the House of Lords in *Houlder Line, Limited* v. *Griffin* (2), and the clear statement of the law in *Handford* v. *George Clark & Co.* (3), and *Harrison* v. *The Oceanic Steam Navigation Co., Limited* (4), we were pressed with an argument, by counsel for the appellants, that the earlier impression that a ship might be a factory within the Factory Acts was correct. It is sufficient for me to refer to the judgment of Collins M.R. in the last-mentioned case, decided in the year 1907. He says (p. 421):—"The ship never was a factory, nor is it right to refer to it as ever having been held to be a factory. The utmost that has ever been held is that if you have a factory in this sense that the dock is a factory, and you have a ship in a dock, then the man in the ship in a dock is in a factory; but none of these cases involve the proposition that a ship becomes a factory; it never does—it occupies a space in a factory, and the man being in the ship occupying a space in a factory is in a factory. I only make that observation because I notice that inaccuracy has crept into the head-note of one of the cases which is frequently referred to in these matters, and, therefore, I thought it right on this occasion to point it out." Cozens-Hardy L.J. agrees, and goes on to say (p. 422):—"I think the origin of the misapprehension to which the Master of the Rolls has alluded was probably due to an error in the head-note to the case of *Bartell* v. *Gray* (1), in which the Court of Appeal are made to say: 'Held the ship was a factory.' Nothing was further from the truth than that statement. What was said was that the ship occupied part of a dock which was a factory, which is a very different thing."

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(1) [1902] 1 K. B. 225.
(2) [1905] A. C. 220.
(3) [1907] 2 K. B. 409.
(4) [1907] 2 K. B. 420.

Accordingly, as Gibson J. has pointed out, it is probable that the regulations were framed on the mistaken view that a ship was itself a factory. *Bartell* v. *Gray* (1) was decided in November, 1901. The Secretary of State had given his certificate in September, 1902, and the regulations were made on the 24th October, 1904. *Houlder Line* v. *Griffin* (2) was decided in 1905, and *Handford* v. *George Clark & Co.* (3) and *Harrison* v. *Oceanic Steam Navigation Co.* (4) were decided in 1907.

As I have said, the statute in itself, in terms perfectly clear, imposes obligations on occupiers of factories, and in terms equally clear imposes obligations in some cases on owners of factories. But apart from the particular class of case dealt with by sect. 104, it has never been suggested, so far as I know, until this case, that the Secretary of State can transfer the obligations created by the statute from the occupier to the owner, or *vice versa*. His functions, so far as ordinary factories are concerned, have been assumed to be confined to making regulations which will give effect to the statutory obligations imposed on certain named classes, but not to extend any class, or to create a new class to become liable to the provisions of the Act, and to penalties for its breach.

(1) [1902] 1 K. B. 225.
(2) [1905] A. C. 220.
(3) [1907] 2 K. B. 409.
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The judgments in the Court below have dealt exhaustively with all the sections up to sect. 73, showing how the statute imposes liabilities on these different classes of owners and occupiers; and in dealing with owners of factories, as defined by the Act, it is obvious that any regulation which would place on an owner who has no control over the factory obligations which Parliament did not think it right to impose on him, would be most unjust.

The block of sections dealing with dangerous and unhealthy industries, beginning with sect. 73, and ending with sect. 86, have also been dealt with by the Court below, and I only wish before coming to sect. 79 to point out and reiterate what has been clearly stated in the judgments below, that between sects. 73 and 78 there can be no more doubt at to the different classes of persons who are made liable to the provisions of these sections than in the other clauses of the Act.

Section 79, which is the section that concerns us in the present case, provides that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, he may certify such to be dangerous, and thereupon may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

The Secretary of State has made regulations under that section, having first given the certificate required. As I have said, no one has until now suggested that, so far as the class of factory other than the artificial factory dealt with by sect. 104 is concerned, he would have power to enlarge or alter the class on whom obligations are placed by the statute. In the present case it has been so contended, and that at any rate, if it be not true of the other sections, he has such power in respect of sect. 104.

We then come to sect. 82 in the same group of sections. Sub-s. 1 enacts:—"The regulations made under the foregoing provisions of this Act may apply to all the factories and workshops in which the manufacture, machinery, plant, process, or description of manual labour, certified to be dangerous, is used (whether existing at the time when the regulations are made or afterwards established) or to any specified class of such factories or workshops. They may provide for the exemption of any specified class of factories or workshops either absolutely or subject to conditions." Sub-s. 2.—"The regulations may apply to tenement factories and tenement workshops, and in such case may impose duties on occupiers who do not employ any person and on owners." Thus we find in this group of sections the jurisdiction of the Secretary of State to make regulations enlarged with regard to a peculiar class of factory, namely—tenement factories and tenement workshops.

Leaving aside sect. 104 for the moment, I take sect. 105, where we have also words imposing liabilities on persons who are to be deemed occupiers of factories in an artificial way. It enacts:—"(1) The provisions of this Act with respect to (i) Power to make orders as to dangerous machinery (sect. 17); (ii) accidents; (iii) regulations for dangerous trades ; (iv) powers of inspectors (sect. 119); and (v) fines in case of death or injury (sect. 136), shall have effect as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connexion with a building were included in the word 'factory' and the purpose for which the machinery is used were a manufacturing process, and as if the person who, by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises, and for the purpose of the enforcement of these provisions the person so using any such machinery shall be deemed to be the occupier of a factory. (2) The provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if (*a*) any building which exceeds thirty feet in height and which is being constructed or repaired by means of a scaffolding, and (*b*) any building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word 'factory,' and as if in the first case the employer of the persons engaged in the construction or repair and in the second case the occupier of the building were the occupier of a factory."

I do not for the moment know, but I do not think, that any regulations have been made under sect. 105 endeavouring to impose liability on a person who was the owner of the land, or anyone save an occupier or employer, and I think that it could not be successfully contended that any person save the occupier or employer as described in that section could be made liable by such regulations. The argument was that the generality of the words in sect. 79 would enable the Secretary of State to bring within both sect. 104 and sect. 105 a person who was not an occupier or employer, or within any of the defined classes of persons; but it is clear, to my mind, that owners are not made liable by sect. 105 itself, or by sect. 104, and I cannot accept the argument that under these sections, any more than the other sections of the Act, the Secretary of State can, by regulations, bring within the obligation and penalties of the statute those not made liable by the Act itself.

Section 106 affords the strongest argument against the contention of the appellants. It provides that "where any line or siding not being part of a railway within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900, is used in connexion with a factory or workshop, or with any place to which any of the provisions of this Act are applied," the provisions of the Act as to making (*inter alia*) regulations for dangerous trades, shall have effect as if the line or siding were part of the factory or workshop. There, where it was necessary to create something which I describe as an artificial factory, namely a siding used in connexion with a factory, the Act uses perfectly apt words for the purpose, expressly making the siding part of the factory.

Now, with regard to sect. 104. The contention of the appellants comes to this, that the section creates a singular and exceptional state of the law under which, although occupiers alone are named, owners might, either by generality of the provisions of sect. 79 or otherwise, have liabilities imposed on them; and that the owner of a ship—a person who, in my opinion, neither by definition nor by any reasonable construction can be dragged into the section—is to be made liable on the assumption that a ship is a factory *per se*, or if not a factory *per se*, becomes a factory by the operation of placing a gangway from the wharf to the ship. In framing a section such as 104, which, without undue elaboration, would fit in with the general scheme of the Act legislating for a thing which was not a factory as if it were one, the draftsman was in great difficulty. He solved it in part by making plant include a gangway or ladder used by a person employed to load or unload a ship, and including plant in the description " factory." But on whom does he impose liability ? Not by making liable the owner of the ship, which itself was not a factory (apart from any question whether machinery in the ship might or might not be a factory), but by providing that the plant, which includes a gangway used in loading or unloading a ship, should be included in the word "factory," and that the person using such machinery or plant should be deemed to be the occupier of a factory. If the owner of the ship was to be made liable, it would have required clear and express language, which is wholly absent.

Accordingly, so far as the statute is concerned, I have no doubt in my mind that the owner of the ship is not made liable in respect of this artificial factory, the gangway.

That, however, is not the construction which the advisers of the Secretary of State placed on the section, and the regulations approach the subject, first from the point of view that the ship itself is capable of being a factory, and then they impose primarily on the owner of a ship, lying at a wharf or quay for the purpose of loading or unloading, the obligation to provide a gangway properly secured and fenced, and also, although no question as to this arises in the present case, to make a regulation that if a ship is alongside any other ship, vessel, or boat, and persons employed have to pass from one to the other, safe means of access shall be provided for their use. Thus the Secretary of State has legislated—for it is legislation, and not regulation—by requiring the owner of the ship, or the master or officer in charge of the ship, to bring into existence a factory—for the gangway is made a factory by this curious method of definition in sect. 104—and by making him liable for its efficiency.

I entirely adopt the view of the Lord Chief Baron that there is ample jurisdiction in the Secretary of State to certify that any process mentioned in sect. 79 of the Act is dangerous, and to make regulations to meet the case, but that the person on whom the duty is to be cast must be determined by the Act itself.

I come now to the last question, as to which I wish to say a few words, because it was not, I think, argued so strongly in the Court below as here. I am of opinion, as is evident from the observations which I have made, that the regulations of the Secretary of State imposing on the owner of a ship, in the circumstances which we find in the present case, the obligations contained in Part II of those regulations with regard to a ship lying at a wharf, are ultra vires; but it is contended that, be they ultra vires or not, there is no jurisdiction in the Court to question them. The argument is based on sect. 84 of the Act, which provides that the regulations are to be laid before both Houses of Parliament, and that "if either House, within the next forty days after the regulations have been laid before that House, resolve that all or any of the regulations ought to be annulled, the regulations shall, after the date of the resolution, be of no effect, without prejudice to the validity of anything done in the meantime thereunder or to the making of new regulations." It is contended that at the expiration of the forty days, if the regulations are not annulled by either House of Parliament, they automatically become in their own nature legislative, and can no more be questioned than the statute from which they are supposed to derive their efficacy.

In support of this view we were pressed with the case of *Institute of Patent Agents* v. *Lockwood* (1). That case, however, does not, nor do the *dicta* in it, in my opinion, support the contention of the appellants.

There are two classes of matters in respect of which the Secretary of State by the present Act is given jurisdiction, namely, matters to be dealt with by special orders, and matters to be dealt with by regulations. The former are dealt with by sect. 126. Sub-s. 3 contains provisions as to laying the order before both Houses of Parliament similar to those in sect. 84, and sub-s. 4 enacts that, "The order, while it is in force, shall, so far as is consistent with the tenor thereof, apply as if it formed part of the enactment which provides for the making of the order." These words are absent, and,

(1) [1894] A. C. 347.

I conceive, designedly absent, from sect. 84, which deals with regulations. If the statute is examined with regard to matters in respect of which special orders may be made, it will be found, without going into every detail, that they are cases where the statute has made a rule dealing with hours of work, holidays, examinations, and so forth, which would be inelastic, and might become inconvenient, unless the Secretary of State was given power by regulations to fix different dates and hours, and provide for different classes of occupations. In a case of that kind, where he merely substitutes one date or hour for another, one can understand the necessity for providing that the substituted provision shall form part of the Act. But, as I have said, as regards regulations, there are no words providing that these shall apply as if part of the Act, and this is to my mind the essential difference between the present case and *Lockwood's Case* (1).

In *Lockwood's Case* (1) it is to be observed that the House of Lords held that the rules there in question were intra vires, but undoubtedly all the Lords, except Lord Morris, went further, and held that it was not competent for them to question the validity of the rules. It may be, and I think it is, a possible view of that case, that the expressions of opinion of the majority on this point are to be taken as meaning that the rules there were to be read much in the same way as I have suggested the special orders are dealt with in the statute before us; that the majority in the House of Lords thought that there was a general scheme provided by the statute in that case, in respect of which the Board of Trade were to fill in the details by making rules, and that rules filling in these details could not be questioned by the Court; because if it is admitted that the statute only provides a framework and the details are to be filled in by a competent authority, it is a case in which the statute delegates the framing of the details to that authority, and therefore it cannot be said that such details are ultra vires. But I do not think that the case in any view can be treated as an authority that where the statute, as in the present case, does not give a delegated power, the Secretary of

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(1) [1894] A. C. 347.

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State can enlarge the statute itself beyond its express legislative words. It is, however, sufficient for me to say that I find in the judgments in *Lockwood's Case* (1) sufficient ground of distinction from the present case. Lord Herschell says (p. 359)—" The words of sub-s. 2 are, ' The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time, make such general rules as are in the opinion of the board required for giving effect to this section, and the provisions of sect. 101 of the Principal Act shall apply to all rules so made as if they were made in pursuance of that section ' . . . Now, let us see what is to be the effect as regards rules made in pursuance of sect. 101 of the Act of 1883. First of all, ' the Board of Trade may from time to time make such general rules and do such things as they think expedient,' and their ' general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, . . . and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.' The ' subject as hereinafter mentioned ' is this, that they are to be laid before Parliament for consideration for forty days, and during those forty days they may be annulled by a resolution of either House. If not so annulled or until so annulled, what is the effect? They are to be ' of the same effect as if they were contained in this Act.' " At p. 360 he says—" I own I feel very great difficulty in giving to this provision, that they ' shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act." Lord Watson (p. 365) after reading the words " shall be of the same effect as if they were contained in this Act, and shall be judicially noticed," says, " My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself." Lord Russell says (p. 367)—" I think that if the rules are to be read as part of the Act (as I think they ought to be), it is not, in this case, competent to judicial tribunals to reject them."

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(1) [1894] A. C. 347.

In the present case the sections giving the Secretary of State power to make regulations contain no such provision as was relied on in *Lockwood's Case* (1), and to mind this, although a narrow, is a sufficient, ground of distinction. I am of opinion that we are entitled to consider whether or not these regulations are ultra vires; and, coming to the conclusion, as I do, that they are, I hold that the plaintiff's cause of action fails, and that the decision of the Court below ought to be affirmed.

As this ground disposes, to my mind, of the whole case, I do not say anything with regard to the other questions which were raised at the Bar, but, in deference to the view of the Court, were not pressed. I mention this in order that if the case goes further it should not be said that the arguments of counsel in the Court of Appeal were confined to the two questions with which I have dealt.

RONAN L.J. :—

In this case I entirely agree with the reasoning of Gibson J., in what the Lord Chief Baron describes as "his luminous judgment." I respectfully adopt that judgment, and that of the Lord Chief Baron, but I wish to state some additional reasons in support of their view.

I intend to deal (1) with the question of the right and duty of the Court to inquire whether or not the regulations are ultra vires; (2) to deal specially with the construction and effect of the certificate of the Secretary of State—whether it authorized the regulations, and whether it is itself authorized by the statute; and (3) to make a few supplemental observations on the regulations.

(1) and (2) of the above matters were apparently not discussed in the Court below. As to (1) all the judges assumed that this Court was bound and entitled to make the inquiry. As to (2) I cannot find that the certificate was considered at all. As to

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(1) [1894] A. C. 347.

No. (1) Mr. O'Brien argued this question very carefully. It depends on the terms of the statute.

There is no doubt that the Legislature can, and sometimes does, preclude the Courts from any inquiry into this question of ultra vires, *e.g.*, The Educational Endowments Act, 1885, sections 9, 11–18, 19–26, 27–29. This statute, as is well known, was prepared by Lord Justice FitzGibbon, and these clauses are a good example of such a case, and of the marvellous skill and care he applied to everything he undertook.

It is well settled that the Court will inquire whether orders by the King or Lord Lieutenant in Council are ultra vires: *Foster* v. *Dodd* (1); *The Kildare Case* (2).

I think it is settled law that when a statute confers a power to make orders, bye-laws, or regulations, the Courts have always assumed the right to inquire whether such were within the scope of and made in conformity with the Act, unless the Act expressly or by implication provided that they should not do so. There is no clause of this nature in the present Act. Is there any other provision having a similar effect? [His Lordship referred to sections 79, 73 (4), 84, and 126 (3), (4), and pointed out that there was no clause to this effect.]

Mr. O'Brien relied on *Lockwood's Case* (3). In that case the Act contained the words that the rules should "be of the same effect as if they were contained in this Act." There is no corresponding clause in relation to the regulations in the present Act, though there is a somewhat similar clause in sect. 126 as to "special orders."

In the House of Lords the leading judgment is delivered generally by the Lord Chancellor or the Peer sitting in his place, and it is not usual for those who express their agreement with his views to go over in detail all the reasons he has given unless they differ from him in some respect. In *Lockwood's Case* (3), at p. 360, the Lord Chancellor points out the difference between a statute of the Imperial Parliament, and a rule, regulation, or bye-law made by any other authority, thus:—"Whereas apart

(1) L. R. 3 Q. B. 67.
(2) [1909] 2 I. R., at p. 217.
(3) [1894] A. C. 347.

from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration whether it be so or not." Now what is the "some such provision" he refers to, which prevents the "canvassing of the rule"? The next words put this beyond doubt. "I own I feel very great difficulty in giving to this provision that they 'shall be of the same effect as if they were contained in this Act' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act" . . . and further on (pp. 360, 361): "I think it only right to express the opinion which I entertain, that the words I have referred to are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated." Lords Watson and Russell agree with the Lord Chancellor, and there is no hint that they do not fully concur with the above. On the contrary, these very words are the only words quoted by Lord Watson, except that he adds the words "and shall be judicially noticed," and says, "Such rules are to be as effectual as if they were part of the statute itself." Lord Russell's judgment is very short. He says: "As to the broader questions, I think the rules are intra vires, and are therefore valid, even apart from the provision . . . that the rules made are to have effect as if contained in the Act itself. But, further, I think, that if the rules are to be read as part of the Act (as I think they ought to be), it is not, in this case, competent to judicial tribunals to reject them." Lord Morris held that even these words did not preclude the Courts from ascertaining if the rules were ultra vires.

The principle of the decision appears to me absolutely clear. If the rules had been "contained in the Act," the Court could not have inquired into the authority of those who made them, *i.e.* the Legislature. Therefore the provision that they "shall be of the same effect as if they were contained in the Act," amounts to a statutory provision equivalent to an express prohibition of any inquiry as to whether the rules were authorized by the Act.

As Professor Dicey says (1)—"This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution." It follows that there can be no question of ultra vires applicable to an Act of Parliament.

But the supremacy belongs to the Legislature alone. Neither the King, the Lords, nor the Commons, nor any two of them, possess this supremacy. It follows that neither the King in Council, nor the Lords and Commons without the King, can confer this immunity from investigation into the authority of persons on whom power is conferred to make regulations such as we are here dealing with.

It seems to me impossible to contend that *Lockwood's Case* (2) has any application to a case where there are no such words as "shall be of the same effect as if they were contained in the Act." It is really unnecessary to consider any of the other cases quoted on this subject.

The jurisdiction conferred by sect. 84 on either House of Parliament to annul regulations is a wholly different thing from the power and duty of the Courts to inquire whether there was any authority to make them. The Courts are confined to this function. They are not judges of the wisdom or expediency of the regulations. On the other hand, under sect. 84, either House can annul them for any reason it thinks right. I can see no reason for holding that such a provision as that contained in sect. 84 relieves the Courts from the duty of considering whether the regulations are ultra vires. Such provisions are very numerous, and I know of no case where one has been held to have this effect.

As to the express approval by one branch of the Legislature, *i.e.*, the King in Council, it is quite settled that this does not preclude inquiry: *Kruse* v. *Johnson* (3).

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(1) Law of the Constitution, 8th ed., p. 68.

(2) [1894] A. C. 347.

(3) [1898] 2 Q. B., at p. 98.

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This is not a case merely of regulations. A condition precedent to the making of any regulations is a certificate under sect. 79 that some one or more of the things mentioned in the section is or are dangerous. The only things so certified in the present case are "processes." What is the power in this respect? "Where the Secretary of State is satisfied that any . . . process . . . *used in factories* is dangerous," he may certify that process to be dangerous, and thereupon may make regulations, &c., to meet the necessity of the case." Sect. 82: "The regulations may apply to all the factories in which . . . the process . . . certified to be dangerous is used, . . . or to any specified class of such factories." They can only apply to factories. Sect. 86 (2): "Printed copies of all regulations for the time being in force under this Act in any factory shall be posted up . . . in conspicuous places in the factory."

It is plain from this that "used in factories" in sect. 79 means real factories—not plant and machinery. Indeed, among the things enumerated in sect. 79 are plant or machinery used in factories.

The certificate in the present case consists of two parts, each dealing with processes. (1) "The processes of loading, unloading, moving, and handling goods in, on, or at any dock, wharf, or quay." Sect. 104 does not apply to this process or the plant used in it. (2) "The processes of loading, unloading, and coaling any ship in any dock, harbour, or canal." Sect. 104 does apply to this process, where applicable. The distinction between "in or at" in (1) and "in" in (2) is very important in this case.

The dock, wharf, and quay are factories. The machinery and plant used in the processes are included in the word "factory." Neither the harbour nor the canal is made a factory. The process is not made a factory. The ship is not made a factory.

It was, at the date of the regulations, thought that a ship in a dock was a factory. It was never suggested that a ship out of dock was a factory, and there never was any possible ground for thinking that a ship in a harbour or a ship in a canal was a factory. It is now clear that a ship in a dock is not a factory. A ship is not a factory at all.

Part V of the Act deals with several classes of factories. (1) Tenement factories; (2) cotton cloth factories; (3) bakehouses; (4) laundries; (5) docks; (6) buildings; (7) railways. It does not deal with ships.

A man in a bed in an hotel is a man in an hotel, but this does not make a bed an hotel. A man in a cab in a dock is a man in a dock, and if the dock is a factory he is a man in a factory, but this does not make the cab a factory, or a man in a cab in the street a man in a factory. A ship in a dock is precisely in the same position as a cab in a dock. A ship is no more a factory *per se* than a bed or a cab.

Sect. 79 only authorizes the certificate in case of "process used in factories." In the first part of the certificate the factory is the dock, wharf, or quay. They are "the premises" in sect. 104. But what is the factory in the second part? In the case of the dock, the dock. But in the case of the harbour and canal, not the harbour; not the canal; not the ship in either; not the machinery and plant—they are "used in the process," the process is not "used in" them (sect. 104). The "factory" is one in which the regulations "in force in the factory" are to be posted up in conspicuous places, sect. 86 (2).

There is no authority whatever to certify as to process, save when used in a factory. A certificate as to process in any harbour or canal is absolutely void. The process is "loading or unloading or coaling any ship." The place in which it is alleged to take place is in any dock, harbour, or canal. Dock is entirely out of the present case. Therefore, even if separable as to dock, there is no certificate authorizing any regulation applicable to the present case of a ship in an open river.

Paragraph 2 of the regulations specifies "the factories" in which the process is used, and to which the regulations shall apply. Thus, "I hereby . . . direct that they shall apply to all docks, wharves, quays, and ships, as aforesaid." But the ship is not mentioned as a place or a factory in which the process is used. She is only mentioned as part of the description of the process. It is not "in any ship or dock." It is in any dock, harbour, or canal. But a process even in a ship in a harbour or canal is not a process in a factory. Therefore this paragraph is unauthorized by the certificate and by the Act. It is the certainly void portion of this which makes the regulation purport to apply to the ship

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in this case, and her owner, master, and occupier. She is in fact a ship in a harbour.

Again, it is only the process used in a factory. It is only the process of loading, unloading, or coaling any ship in any dock, harbour, or canal, that is certified to be dangerous. There is no power to certify, and no certificate, in the case of a ship "lying at a wharf or quay," which is not a ship in a dock, harbour, or canal. There are many wharves and quays which are not in docks, harbours, or canals. For instance, there are several on the open sea coast between Rhyl and Bangor.

Regulation 4 seems plainly bad on this ground. Regulation No. 5 has no limitation at all; it applies to two ships anywhere. The same observation applies to No. 6. Even if these regulations are limited to ships in harbours or canals, they are bad for the reasons already stated.

Who was doing the unloading in this case? The stevedore. The map in evidence shows that it was done by cranes on the wharf. The officers and crew of the ship took no part in it. Who was the person using the "plant," including the gangway and ladder, in "the process of unloading"? Substitute "unloading" for "loading" in Lord Halsbury's judgment in *Stuart* v. *Nixon* (1), on the similar section (s. 23) of the Factory and Workshops Act of 1895. "I say so far as the word 'loading' is concerned, can anyone doubt that the whole operation was intended to be included . . .? Nor do I entertain any difficulty about the stevedore being the person who was doing it. I could quite understand that if the crew was engaged in doing it, it could be said that, although the joint action of the stevedore and the crew was 'loading,' yet the stevedore was not loading, but the crew were, in this particular matter. . . . Can it be reasonably contended that the putting in of the hatchway, and completing the safety of the vessel, was not a loading of the vessel?"

Surely the stevedore here, who was the person using the cranes on the wharf and the gangway for access for his men, was "the occupier of the premises" under sect. 104, and "the person having the actual use or occupation of the . . . wharf, and the person so using any such machinery or plant."

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(1) [1901] A. C., at p. 89.

This appears to me a complete answer to the argument of the Lord Chief Justice, on this part of the case, once it is admitted, as he admits, that a ship at a wharf in an open river is neither a factory nor part of a factory. Her position appears to me to be exactly similar to that of the railway in sect. 106 used in connexion with a factory, which is *thereby* made part of the factory. There is no such provision as to a ship at a wharf.

The confusion and difficulty in the present case are caused by this system of legislating by deeming things to be what they cannot possibly be, e.g., as in the present statute deeming a piece of rope to be a factory, and then providing for what shall happen in a factory.

In *Hall* v. *Snowden* (1), three extremely able judges of the Court of Appeal, A. L. Smith L.J., Collins L.J., and Vaughan Williams L.J., were driven to the conclusion that a wharf only became a factory for the purposes of the case before them, after the first accident had happened on it; that in fact it was like the common notion of a dog, entitled to one bite. Three or four years elapsed before this decision was impliedly overruled by the House of Lords.

With this example before us, and the earlier authorities as to a ship in dock, it is not surprising that the effort to construct valid certificates and regulations in pursuance of this legislation has failed in some respects. It would have been very remarkable if the attempt had been wholly successful.

Molony L.J.:—

In this case the jury have found that it was reasonably practicable to employ a gangway as a means of access from the shore to the ship, and that the ladder that was actually employed was not reasonably safe for the purpose. They have also found that Mackey fell from the ladder, and that the approximate or direct cause of his death was the non-user of a gangway in accordance with the statutory requirements.

It was contended on behalf of the defendants that there was no evidence to support these findings, and further, that the regulations made by the Secretary of State on the 24th October, 1904, under the provisions of the Factory and Workshop Act, 1901,

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(1) [1899] 2 Q. B. 136.

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were ultra vires, in so far as they purported to impose a duty upon the owner, master, or officer in charge of a ship lying at a wharf or quay for the purpose of loading or unloading, to provide a gangway as specified in regulation 4.

I am quite satisfied that there was ample evidence to support the findings of the jury, and consequently the only questions which have to be determined in this case are (1) Is the Court at liberty to consider whether the regulations are ultra vires? and (2) If so, are the regulations ultra vires?

Mr. O'Brien K.C. in his able argument contended that when regulations are made under the provisions of the Factory and Workshop Act, 1901, and have been duly laid before both Houses of Parliament in the manner prescribed by sect. 84 of the Act, and not annulled under the provisions of the said section, they have the force of a statute, and are not to be questioned in any judicial proceeding. He relied strongly upon the *Rev. Thomas Pelham Dale's Case* (1), and *The Institute of Patent Agents* v. *Lockwood* (2).

The provisions of the Public Worship Regulation Act, 1874, s. 19, as regards laying the regulations before Parliament, are practically identical with sect. 84 of the Act of 1901. In *Dale's Case* (1) Lord Coleridge C.J. said (p. 398):—"I am of opinion that so far as the rules and orders, including the forms, conform to the statute and are not inconsistent with it, the rules, orders, and forms have Parliamentary authority." Brett L.J. went further, because he said (p. 455):—"I am of opinion that the rules and orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, and if not objected to they are then to be binding. Whenever that provision is introduced into an Act of Parliament it seems to me that the rules and orders, if not objected to by Parliament, become part of the statute." It is to be noted that in that case it was held by all the judges that the power to make rules and orders regulating the procedure included the power to frame forms, and there was no suggestion that the forms as framed were in excess of the power.

(1) 6 Q. B. D. 376.

(2) [1904] A. C. 347.

Lockwood's Case (1) arose under the Patents, Designs, and Trade Marks Act, 1883, which not only provided for laying the rules before Parliament, but further stated that such rules should be of the same effect as if they were contained in the Act, and should be judicially noticed. It was held that the rules there in question, having been laid before both Houses of Parliament for forty days, were "of the same effect as if they were contained in" the statute, and that so long as they remained in force it was not competent to question their authority. All the judges relied upon the provision that the rules were to be as effectual as if they were part of the statute, as making it incompetent for judicial tribunals to reject them.

This case was fully considered in Ireland in *The Queen* (*Conyngham*) v. *The Pharmaceutical Society of Ireland* (2). The provisions of sect. 17 of the Pharmacy (Ireland) Act, 1875, which were considered in that case, were almost identical with the provisions of the Patent, Designs, and Trade Marks Act, 1883. The regulations which were there considered contained a provision which was repugnant to the provisions of the Act of 1875, and it was held by Palles C.B. and O'Brien J. that it was competent to the Court to determine the question of their validity. Palles C.B. said, in reference to *Lockwood's Case* (1):—"Indeed it is insisted that it lays down a general rule of law, for the guidance of all subordinate tribunals, in reference not alone to such a section as was there considered, but to all cases of enactments which confer on a body a power of making rules for certain defined and limited purposes, provided only the enactment directs that when made they shall be to the same effect as if contained in the Act. An attentive analysis of the opinions of the learned Lords has satisfied me that they did not intend to lay down any such general rule as has been insisted upon here, and that the essential basis of the decision there was the generality of the power, coupled with the right to annul reserved to each House. The subject-matter of that power was not such rules as were, in law, or according to judicial rules 'required for giving effect' to the section. The subject-matter was 'such rules' as '*in the opinion of the board*' were so required. The sole limitation to the extra-ordinarily extensive power is '*the opinion of the board*,' and this circumstance is expressly made part of the *rationes decidendi* of the Lord Chancellor and Lord Watson."

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(1) [1904] A. C. 347.
(2) [1899] 2 I. R. 132.

The section we are dealing with here does not contain any provision making the regulations of the like force and effect as if they had been enacted in the Act, but it is strange to observe that sect. 126 of the same statute, in regard to a special order of the Secretary of State made under other sections of the same Act, provides that such an order, while it is in force, shall, "so far as is consistent with the tenor thereof, apply as if it formed part of the enactment which provides for the making of the order." The omission of any similar words from sect. 84 is remarkable, and it may reasonably be assumed that they were not omitted without a reason.

I am of opinion that it is quite competent for the Court to consider the validity of the regulations which have been made by the Secretary of State, and *a fortiori* to consider the validity of the certificate which is a condition precedent to the making of such regulations.

Sect. 79 of the Act provides that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories or workshops, is dangerous or injurious to health, or dangerous to life or limb, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous, and thereupon he may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable and to meet the circumstances of the case. Sect. 104 provides that the power to make regulations for, inter alia, dangerous trades, *i.e.*, sect. 79, shall have effect as if every dock, wharf, quay, warehouse, and all machinery or plant used in the process of loading, unloading, or coaling any ship in any dock, harbour, or canal, were included in the word "factory," and the purpose for which the machinery or plant was used were a manufacturing process, and as if the person who by himself, his agents, or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises; and the expression "plant" is declared to include any gangway or ladder used by any person employed to load or unload or coal a ship.

The Secretary of State, in pursuance of sect. 79, certified the process of loading, unloading, or coaling any ship in any dock, harbour, or canal, to be dangerous, and he then proceeded to make the regulations under the power given to him by sects. 79 and 104. He directed that the regulations so made should apply to all docks, wharves, quays, and ships, and that it should be the duty of the owner, master, or officer in charge of a ship to comply with Part II of the regulations.

Regulation 4, Part II, provides that if a ship is lying at a wharf or quay for the purpose of loading, unloading, or coaling, there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore, or from the shore to the ship, and then specifies that where a gangway is reasonably practicable, a gangway of the prescribed dimensions shall be provided, and that in other cases provision shall be made by means of a ladder of adequate length.

The jury have found that it was reasonably practicable to employ such a gangway, and if the regulation is binding upon the defendants, as being owners of the vessel, the plaintiff is entitled to recover.

I do not propose to go again through the cases which have all been so carefully and critically examined by Mr. Justice Gibson in the Court below, but I agree with him fully where he says:— " The regulations of 1904 were based on the mistaken view that a ship in a certain situation was itself a factory. The misconception was not unnatural, and was excused by many judicial utterances of a misleading character. The cases may be ranged in different classes, according as they refer to contractors for repairs, discharge by the consignee's stevedore, or by the ship's stevedore. They may also be considered in reference to the particular statute before the Court, and to date. In *Houlder's Case* (1), after the regulations, and in the cases explaining and following it—*Smith's Case* (2); *Handford's Case* (3), and *Harrison's Case* (4)—the mistake was corrected, and it must be taken as now settled that a ship, as such, is not a factory like a wharf, though if a shipowner uses a wharf or machinery for discharge, he is,

(1) [1905] A. C. 224.
(2) [1906] 2 K. B. 275.
(3) [1907] 2 K. B. 409.
(4) [1907] 2 K. B. 420.

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in relation to the wharf or machinery so occupied or used, deemed to be in the position of a factory occupier: *Handford's Case* (1). The value of the decisions, whether against stevedores or others, is that of treating the person in immediate occupation as the person answerable. I can discover no authority suggesting that a person not an occupier in the statutory sense can be converted into an occupier by regulation or otherwise. Up to the present no book or case indicates that the course of ordinary commercial contracts has been changed. The regulations now come up for consideration for the first time."

After a full and careful examination of the statute, and of all the authorities which have been referred to, I have come to the conclusion that the liability prescribed by clause 4 (*a*) of the regulations can, by the Act, be cast upon the occupier of a factory alone, and that, in the circumstances of the present case, the defendants cannot be regarded as such occupiers, and are, therefore, not liable in this action (1).

Solicitor for the appellant: *Henry D. Keane.*
Solicitors for the respondents: *T. Thornton & Son.*

J. G. T.

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(1) [1907] 2 K. B. 409, at pp. 414, 415.

(1) CORRIGENDUM.—*Ante*, page 241, line 9 from end, for "were confined to", read "are reported upon only".

GUARDIANS OF THE POOR OF THE BELFAST UNION, Appellants; WILLIAM JONES, Respondent (1).

K. B. Div.
1915.
Nov. 2.

Justices—Sale of Food and Drugs—Selling to the Prejudice of Purchaser an Article of Food not of the Quality demanded—Sale by Contractor of New Milk deficient in quantity of Milk Fat contracted for—Article not of "nature, substance, and quality" demanded—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6; *Sale of Food and Drugs Amendment Act*, 1879 (42 *&* 43 *Vict. c.* 30), *s.* 2*—Meaning of "nature," "substance," and "quality" considered.*

The effect of s. 2 of the Sale of Food and Drugs Amendment Act, 1899, is that in s. 6 of the Sale of Food and Drugs Act, 1875 (2), the words "nature, substance, and quality" are to be read distributively, and a penalty is incurred under that section if the article sold, although unadulterated, is not of the quality demanded.

The respondent had contracted to sell to the appellants new milk containing not less than 3 per cent. of milk fat. Some of the milk supplied contained less than this proportion.

Held, that the respondent was liable to a penalty, although the milk was supplied in the same state as that in which it came from the cow.

Cases Stated under 20 & 21 Vict. c. 43, at the instance of the appellants, by the justices of the peace acting for the petty sessions district of the county of the city of Belfast, on a dismiss on the merits of a complaint brought by the appellants against the respondent under section 6 of the Food and Drugs Act, 1875, 38 & 39 Vict. c. 63.

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(1) Before Cherry L.C.J. and Boyd J.

(2) Section 6 of the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), provides:—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20."

Section 2 of the Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30), provides, inter alia:—"Neither shall it be a defence to prove that the article of food or drug in question, though defective in nature, or in substance, or in quality, was not defective in all three respects."

The appellants, who were Guardians of the Belfast Union, took out a summons against the respondent, a dairy proprietor, charging that "he did on the 22nd day of April, 1915, at the Union Workhouse, Belfast, sell to the complainants, to their prejudice as the purchasers thereof, an article of food, to wit, new milk, which was not of the nature, substance, and quality of the article demanded by the purchasers, and which said article of food has been certified on analysis to contain 1·1 per cent. of added water, and to be 8·6 per cent. deficient in milk fat . . . contrary to the provisions of the statute."

The case came on for hearing at the petty sessions for the petty sessions district of the county of the city of Belfast, held on the 24th May, 1915, when both appellant and respondent were present.

Evidence of the following matters was given before the justices:—

The respondent, a dairy proprietor, entered into a written contract with the appellants for the supply to them of a certain quantity of new milk daily. It was a specific term of the contract that the milk to be supplied by the respondent should be new milk, containing not less than 3 per cent. of milk fat. The milk was supplied by respondent daily in several cans. On the 22nd April, 1915, three cans of milk were sent by the respondent to the guardians. Mr. Mahood, the master of the workhouse, took from one of the cans a sample which on analysis was found to contain only 2·74 per cent. of milk fat. Evidence was given on behalf of the defendant that the milk was in the same state as when it came from the cow, and that of the three cans supplied on that day the sample was taken from the smallest.

Mr. Graham, on behalf of the defendant, contended that the milk depended upon the character of the cow and the condition of health it was in, and the time of milking. It was well known that a cow would often give milk which was not so good in strength, but was greater in flow. He thought the law was that if the milk was as it came from the cow there could be no conviction, in other words, a man could not contract himself into an offence against the criminal law. He had proved that the milk supplied was as it came from the cow. Defendant had sent three cans of milk, two large and one small. He thought Mr. Mahood should have taken a sample from each of the cans. The guardians were in no better position as regards taking samples than any other person. The milk in each of these cans was as it came from the cow, and if the guardians did not find it up to their standard, then they had the ordinary action for breach of contract.

Mr. Harper, in reply, on behalf of the complainants cited the cases of *Ferett* v. *Walsh* (1) in which he said it had been decided that an inspector need only take a sample from one can, and, that if he took samples from other cans he could proceed separately in respect of each sample taken. He also cited the case of *Heywood* v. *Whitehead* (2) in which he said it was decided that if a man ask for a certain article he is bound to get it. The guardians asked not merely for new milk, but milk up to a certain standard. He contended that, having regard to the evidence, the form of complaint, and the form of contract, the guardians were not supplied with milk of the nature, substance, and quality demanded and contracted to be supplied.

The justices stated that they were satisfied upon the evidence, and found, as a fact, that the milk in question was unadulterated, and was delivered to the complainants in the same state in which it came from the cow, and they accordingly dismissed the case.

J. M. Whitaker (with him *R. F. Harrison K.C.*), for the appellants:—

The prohibition in section 6 of the Act of 1875 is not confined to the sale of adulterated articles. Section 2 of the Amending Act of 1879, passed in consequence of the decision in the Scotch case of *Davidson* v. *M'Leod* (3), makes it clear that the words in section 6 of the Act of 1875 prohibiting the sale of an article "not of the nature, substance, and quality" demanded, are to be read distributively. The Act of 1875 deals with two classes of sale—(*a*) to the public under section 6, (*b*) to inspectors under section 13. The proviso in section 6 does not refer to a natural article. Two classes of offences arise under the statute—(*a*) on a sale to an inspector, (*b*) on a private sale. In the latter case the question whether the article supplied is of the nature, quality, and substance demanded depends entirely on the contract between the vendor and the purchaser. If the purchaser contracted for a supply of inferior milk, the vendor, if he supplied that to an inspector, might be guilty of an offence, but he could not be guilty of an offence under section 6 by supplying it to the purchaser. On the other hand, if the article supplied to the purchaser is not up to the contract quality, an offence under section 6 is committed. The Legislature here punishes a breach of contract because in the sale of food and drugs in small quantities to poor persons the civil remedy would be entirely inadequate.

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(1) [1891] 2 Q. B. 304.

(2) 13 T. L. R. 503.

(3) 42 J. P. 43; 5 Rettie (J.C.) 1.

[He referred to:—*Hilliard* v. *Enniskillen Guardians* (1); *Buckler* v. *Wilson* (2); *Goulder* v. *Rook* (3); *Knight* v. *Bowers* (4); *Smithies* v. *Bridge* (5); *O'Driscoll* v. *Dolan* (6).]

T. W. Brown, for the respondent:—

Having regard to section 2 of the Act of 1879, I do not contend that proof of adulteration is necessary. There is, however, no proof that the quantity of milk contracted for did not average the quality demanded. The guardians stand on their contract, but their contract was for seventy-five gallons, and the sample was only taken out of one can, and that the smallest, which contained only twelve quarts. The three cans should have been mixed before a sample was taken, as the quality of the milk in the other cans may have been above the standard set out in the contract.

CHERRY L.C.J.:—

This was a prosecution instituted by the Guardians of the Belfast Union. The case sets out that at a petty sessions holden for the petty sessions district of the city of Belfast, one William Jones, who had contracted for the supply of milk to the complainants, was charged in a certain summons that "he did on the 22nd day of April, 1915, sell to the complainants . . . to their prejudice as the purchasers thereof an article of food, to wit, new milk, which said food was not of the nature, substance, and quality of the article demanded by the purchasers."

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(1) 14 L. R. Ir. 214.
(2) [1896] 1 Q. B. 83.
(3) [1901] 2 K. B. 290.
(4) 14 Q. B. D. 845.
(5) [1902] 2 K. B. 13.
(6) 45 I. L. T. R. 144.

K. B. Div.
1915.

Belfast Guardians v. Jones.

Cherry L.C.J.

It appears from the evidence in the case that the guardians had a regular form of contract in writing, and that by that contract they required to be furnished with new milk containing not less than 3 per cent. of milk fat, and not less than 8·5 per cent. of milk solids. The milk actually supplied by Jones was tested, at the instance of the master of the workhouse, by the taking of a sample from one of the cans, which sample on analysis was found to contain 2·74 per cent. of milk fat, that is less than the 3 per cent. required. This raised the question of adulteration, and after hearing the evidence the Bench came to the conclusion that there was no adulteration proved. They held that the contractor had supplied new milk, but that the milk in one can was deficient in the quality contracted for. The magistrates found as a fact that there had been no adulteration, and that finding raises the question whether, notwithstanding such finding, they were bound to convict if the milk supplied was not of "the nature, substance, and quality" contracted for. There is no dispute as to the facts, and we now know, by the very candid admission of Mr. Brown at the Bar, that there is no substantial dispute as to the law.

Had the case depended only on the section relied on in the original Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), there would be much to be said for the defendant. That section, the 6th, provides:—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20." The primary object of that section was evidently to deal with cases of adulteration. If it were necessary to prove change in the nature, substance, *and* quality, the three different matters mentioned, it would be difficult to convict in any case unless adulteration was proved, or the sale of an article of an entirely different character from that contracted for. Owing to the decision of the Scotch Courts in *Davidson* v. *M'Leod* (1), that the three words, "nature," "substance," and "quality," were to be read conjunctively, the subsequent statute of 1879, the Sale of Food and Drugs Amendment Act, 1879 (42 & 43 Vict. c. 30), was passed, which by section 2 enacted that these words, "nature," "substance," and "quality," were to be read disjunctively. Under the latter section there appears to be no question now that a prosecution can be sustained even in cases where no adulteration is proved. The words to be taken separately deal with three distinct matters:—"nature" applies particularly to the character of the thing supplied: for instance, supplying margarine where butter is demanded; "substance" appears to me to have reference to the case of adulteration—thus where coffee is asked for, coffee mixed with chicory must not be supplied; and "quality" clearly refers to the case where the nature and substance of the article supplied are correct—where the article is the article contracted for, but it is found to be deficient in the standard demanded, as here.

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(1) 42 J. P. 43; 5 Rettie (J.C.) 1.

For these reasons we have come to the conclusion that this case must be returned to the magistrates with a direction that section 6 of the Act of 1875 is not confined to cases of adulteration, and that, if they are satisfied on the evidence that the quality of the milk supplied was not up to the standard contracted for, it is their duty to convict on the summons.

Solicitor for the appellants: *William Harper.*
Solicitor for the respondent: *John Graham.*

C. N. K.

HUGHES, Appellant; TRAYNOR, Respondent.
M'NEILL, Appellant; CARSON & CO., Respondents (1).

K. B. Div.
1916.
April 4, 12.

Sale of Food and Drugs—Indian Meal for human Food—Extraction of Natural Oil—Nature, substance, and quality demanded—Prejudice of the Purchaser—Commercial Usage—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6.

For about twenty years past there had been sold throughout Ireland in large quantities, as Indian meal for human food, a preparation derived from genuine pure crushed Indian corn, by removing "offal"—i.e., all foreign matter such as husk, bran, and woody fibre—and lastly, the germ of the corn, and with it more than half the natural oil contained in the berry. The public preferred this refined preparation for human food, but they were generally ignorant of its composition and nutritive value. The unrefined Indian meal, used principally as cattle-food, is more nutritious; but the normal man would not eat it if he could get the refined preparation, as the latter is far more palatable, and also keeps longer.

The appellant, a shopkeeper, was prosecuted for having sold to the prejudice of a purchaser Indian meal, deficient in natural oil to the extent of at least 62 per cent. The purchaser had required the meal for human food, and had been supplied with the refined meal.

Held, that the article sold was of the nature, substance, and quality demanded, notwithstanding the removal from it of more than half the natural oil; that the sale was not to the prejudice of the purchaser; and that no offence had been committed under s. 6 of the Sale of Food and Drugs Act, 1875.

Hughes, Appellant; Traynor, Respondent.

Case Stated by justices pursuant to 20 & 21 Vict. c. 43.

At the Newtownhamilton petty sessions held on the 10th day of January, 1916, the complainant, an inspector under the Food and Drugs Act, charged the defendant, a grocer, that the defendant did on the 4th day of September, 1915, at Armagh Street, Newtownhamilton, by his wife, Catherine Hughes, unlawfully sell, to the prejudice of the complainant as purchaser thereof, an article of food, to wit, one pound of Indian meal, it being deficient in oil natural to Indian meal to the extent of at least 62 per cent.

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(1) Before Cherry L.C.J. and Gibson and Boyd JJ.

The facts proved or admitted were as follows:—

On the 4th day of September, 1915, complainant went to the shop of defendant in Newtownhamilton, and asked the wife of defendant for a pound of Indian meal. He told her he was an inspector under the Food and Drugs Acts, and wanted the meal for analysis by the public analyst. She said she had two sorts of Indian meal, one better than the other. He said he would take the better, paid one penny, and was supplied with one pound of meal. He complied with the statutory formalities as to dividing, sealing, and sending samples to the public analyst. He produced the analyst's certificate as to the composition of the meal supplied to him, and called the analyst as a witness. He took the sample as a sample of Indian meal for human food, not as a sample of Indian meal for cattle food. From the analyst's certificate it appeared that the sample was deficient in oil natural to Indian meal to the extent of at least 62 per cent.

The pound of meal supplied to him was a refined preparation of Indian meal, locally known as "Gem" Indian meal, and specially prepared for human food.

There is no standard fixed by statute or any public authority for the percentage of oil in Indian meal for human food, or cattle food.

By the practical experience of analysts, it is found that there is a minimum of 4 per cent. of oil in crushed Indian corn—the berry as it is ground prior to undergoing any process of refinement. "Gem" meal is not genuine pure crushed Indian corn.

For about twenty years past there has been sold throughout Ireland in large quantities as Indian meal for human food a preparation derived from genuine, pure, crushed Indian corn, known by various fancy names, and in Newtownhamilton as "Gem" Indian meal. For this period it has been made by the trade, and bought by the public as best Indian meal for human food. The trade standard percentage of oil in it is about 1 per cent. The public consider this refined preparation the best Indian meal for human food, but they are ignorant of its composition and nutritive value. It is prepared from the crushed Indian corn by removing "offal"—by which was understood foreign matter, "husk, bran, and woody fibre," which is to a great extent indigestible—and lastly, the "germ" of the corn, and with it about 50 per cent. or more of the natural oil contained in the entire berry.

The complainant, in his pound of "Gem" Indian meal, got much less oil, but more albumenoids or starch, than are contained in a pound of unrefined Indian meal. Both starch and albumenoids are highly nutritive.

The justices accepted the uncontradicted statement of the analyst that unrefined Indian meal is decidedly more nutritious for the normal man than is "Gem" Indian meal. The normal man will not eat the unrefined Indian meal if he can get the "Gem" Indian meal. The latter is much more palatable. "Gem" Indian meal is very largely consumed as human food. Unrefined Indian meal is but little used as human food, but largely as cattle food. The "Gem" Indian meal (in consequence of the elimination of a large proportion of the oil) keeps much longer in a palatable condition.

It was contended for the prosecution that when the inspector demanded the best Indian meal, he should have got meal containing at least 4 per cent. of oil, and that what he got was not genuine Indian meal.

For the defence it was contended that the inspector got what he asked for, viz., the Indian meal which was best for human food, prepared for twenty years as such by the trade, and preferred by the public to the more oily unrefined meal, and up to the commercial standard for Indian meal for human food.

The majority of the magistrates were of opinion that they were bound to consider the nutritive value of the meal alone; to disregard the standard of oil in Indian meal for human food set up by the commercial usage and practice of millers for twenty years; and they convicted defendant accordingly on the ground that defendant was not entitled to sell as best Indian meal for human food a preparation from which any part of the natural oil had been removed without informing the purchaser of such removal; and on the ground that the complainant had been deceived as to the nutritive value of his purchase.

The opinion of the Court was sought as to whether the justices were right in law in convicting the defendant on said complaint.

Cusack (with him *Hanna K.C.*), for the appellant :—

Sect. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), under which the prosecution has been brought, does not prescribe a standard for Indian meal, either for cattle or human food. The purchaser got what he demanded — Indian meal for human food. What was sold to him was the article known commercially to the trade and to the public as a refined preparation of Indian meal for human food. When a purchaser gets what he asks for, there is no offence under sect. 6 of the Act. The sale of a particular kind of tapioca as "sago" is lawful when it can be proved that such tapioca is known to the trade and the public as "sago": *Sandys* v. *Rhodes* (1).

[He also cited *Anderson* v. *Britcher* (2) ; *Smith* v. *Wisden* (3) ; *Lane* v. *Collins* (4).]

C. Murphy (with him *Serjeant Matheson, K.C.*), for the respondent :—

The justices have found as a fact that there was a sale to the prejudice of the purchaser. It should have been brought to the knowledge of the purchaser that a certain proportion of the food element had been abstracted in the process of manufacture. Where no standard is fixed by law the justices must form the best judgment they can, having regard to their own knowledge: *Webb* v. *Knight* (5). A person who supplied milk, taken direct from the cow, but which, in consequence of the length of time which had elapsed since the cow was last milked, was deficient in fat, was held to have been rightly convicted: *Smithies* v. *Bridge* (6).

Hanna K.C., in reply :—

Sect. 6 of the Act of 1875 applies to adulteration, and sect. 9 to abstraction. "Quality" in sect. 6 means commercial quality: *Anness* v. *Grivell* (7).

Cur. adv. vult.

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(1) 67 J. P. 352.
(2) 30 T. L. R. 78.
(3) 66 J. P. 150.
(4) 14 Q. B. D. 193.
(5) 2 Q. B. D. 530.
(6) [1902] 2 K. B. 13. [See also *Belfast Guardians* v. *Jones*, *ante*, p. 269.—ED.]
(7) [1915] 3 K. B. 685.

McNeill, Appellant; Carson & Co., Respondents.

K. B. Div.
1916.
M'Neill
v.
Carson & Co.

In this case the complainant was Acting-Sergeant Samuel MacNeill, Lurgan, Inspector of Food and Drugs, and the defendants were James Carson and John H. Talbot, trading as Carson & Co., of Lurgan. The charge was that on the 14th August, 1915, the defendants did unlawfully sell to the complainant, and to his prejudice as the purchaser thereof, one pound of white Indian meal, which was not of the nature, substance, and quality of the article demanded, the same containing only 0·95 per cent. of oil, being, therefore, deficient in oil natural to Indian meal to the extent of at least 76·25 per cent.

The case was heard before the justices at Lurgan Petty Sessions, when the following evidence was given:—

Acting-Sergeant Samuel McNeill proved that on the 14th August, 1915, he, as Inspector of Food and Drugs in Lurgan, went to the shop of the defendants, trading as Carson & Co., and asked for one pound of "white Indian meal." He was supplied with this by an assistant in the shop. He stated that he purchased it for the purpose of having it analysed by the county analyst, and he divided the sample in the usual way, and forwarded one of three portions to the county analyst, and he handed in a certificate from the analyst. From this certificate it appeared that the sample was deficient in oil natural to Indian meal to the extent of at least 76·25 per cent.

For the defence Mr. J. Carson proved that he buys large quantities of "white Indian meal," which is Indian meal subjected to a refining process, in the course of which the oil is to a great extent extracted with the object of making it more palatable and digestible, and also of rendering it less liable to become rancid by keeping. He stated that "white Indian meal" is a commercial term well recognized by traders and by the public, that it is far more expensive than ordinary Indian meal, and that he had bought this particular "white Indian meal" from an agent of a Belfast firm, and that it was sold to the complainant in the same state as it had been received by him.

A Mr. Knox also proved that in the course of his trade he sells largely "white Indian meal"; that it is a substance well recognized

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v.
CARSON & Co.

by the trade and by the public as being refined by the extraction of oil from Indian corn.

Mr. Harris, solicitor for the complainant, asked the magistrates for a conviction upon the analyst's certificate.

Mr. Menary, for defendant, called the magistrates' attention to the case of *Sandys* v. *Rhodes* (1).

The case stated concluded as follows :—

" So far as the magistrates are aware and believe, no standard is fixed by statutes or other authority for the amount of oil which should be in 'white Indian meal.' As this is not a case of adulteration, they regard the analyst's observation which is made 'at his discretion' as something of an extraneous fact (*R.* v. *Smith* (2)). Taking into consideration the usage and understanding of commerce in respect of this article, they believed that the complainant got what he asked for without being prejudiced, and they dismissed the summons ; and the opinion of the High Court is sought as to whether they were right or wrong in so deciding."

Sergeant Matheson K.C., and *C. Murphy*, for the appellant.

Cusack, for the respondents.

Cur. adv. vult.

April 12.

HUGHES
v.
TRAYNOR.

M'NEILL
v.
CARSON & Co.

CHERRY L.C.J. :—

In these two cases, where the facts are almost identical, a serious question of law is raised as to the legality of the sale, under the Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), of a specially prepared commodity known in different localities by different names, but substantially of the same character, and described as "Gem" Indian meal in one case and "white" Indian meal in the other. The magistrates, by a majority, in the first case convicted the defendant, and imposed a nominal penalty. In the second case they dismissed the summons. It will be convenient for us in giving judgment to deal with the two cases together.

From the facts, as found by the magistrates in the first case, it appears that for about twenty years past there has been sold throughout Ireland, in large quantities, an Indian meal, prepared from genuine pure crushed Indian corn by removing what is called "offal," *i.e.* all foreign matter, such as husk, bran, and woody fibre, and lastly—this is the important point—the germ of the corn. This germ takes with it about 60 per cent. or more of the natural oil contained in the entire berry. The public consider this refined preparation the best Indian meal for human food, but they are generally ignorant of its composition and nutritive value. The unrefined Indian meal is decidedly more nutritious, but the normal man will not eat it if he can get the "Gem" Indian meal, as the latter is far more palatable, and also because it keeps longer—the vegetable oil, if not removed, tending to become rancid. The evidence of the analyst showed that, while unrefined Indian meal would contain at least 4 per cent. of oil, the specimen of the "Gem" Indian meal examined by him contained only 1·52 per cent. of oil.

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(1) 67 J. P. 352.

(2) [1896] 1 Q. B. 596.

The prosecution was, in both cases, brought under the 6th section of the Food and Drugs Act, 1875, which provides that "no person shall sell, to the prejudice of the purchaser, any article of food . . . which is not of the nature, substance, and quality of the article demanded by such purchaser" under the penalty provided by the Act.

Two things must be proved in order that any person may be convicted under this section—(1) that the article sold is defective in nature, or in substance, or in quality; and (2) that the sale was to the prejudice of the purchaser. In my opinion there was not evidence, in the present case, on the facts stated by the magistrates to sustain either proposition.

As to the first, it is true that the Amendment Act, 1879 (42 & 43 Vict., c. 30), renders it unnecessary to prove that the article sold is defective in all three respects. It is sufficient to prove that it is defective in nature, substance, *or* in quality (sect. 2). In considering the question, the majority of the magistrates in the first case held that they were bound to consider the nutritive value of the meal alone, and to disregard the uncontradicted evidence as to the public taste, and the preservative effect of the removal of the oil. In this I think that they were clearly wrong. They were bound, in my opinion, to take into account all the circumstances of the case—the commercial usage and practice of manufacturers; the public taste; the relative prices of the two commodities; and the fact that the unrefined Indian meal was almost exclusively used for the feeding of cattle. Had they duly considered all these matters, they would, I am sure, have come to the same conclusion as the magistrates in the second case did, namely, that the article sold *was* of the nature, substance, and quality demanded, notwithstanding the removal from it of a little more than half of the natural oil.

With regard to the second point, I am equally clear that there was no evidence given in either of the cases before us that the sale was to the prejudice of the purchaser. It is that which distinguishes this case from *Smithies* v. *Brown* (1) and a number of other cases as to the sale of milk. There it was clearly established or admitted that the article supplied was inferior in quality to the article demanded. Here the evidence was all the other way. It was proved that the refined Indian meal was, for human food, universally preferred to the unrefined meal.

Under the circumstances I am of opinion that the conviction in the first case cannot be allowed to stand, but that the summons should be dismissed; and in the second case, that the order of the magistrates dismissing the summons should be affirmed.

GIBSON J.:—

The prosecution is based on sect. 6 of the Act of 1875, not on sect. 9. The exact relation of this latter section to the former and its possible effect in limiting the ambit of sect. 6 I do not propose to discuss, as the main argument has been addressed to sect. 6 on the assumption that the abstraction proved might render the meal sold different in quality from that demanded, to the purchaser's prejudice. On that assumption, in favour of the complainant, I think the offence was not established.

Sale depends on contract, and what is agreed to be sold is a question of fact. Where the contract is in writing, the description of the goods sold would usually preclude controversy. Such contract, however, must be interpreted in reference to the surrounding circumstances. Milk sold to an ordinary customer at 4*d.* or 5*d.* a quart would obviously import milk in its natural state, and not skim or separated milk, which latter sells for a trifling sum. So, a generic term may be part of the description, though in commercial use the term may have a restricted or special operation—particularly where the article represents the product of manufacture. Care, however, must be taken lest manufacturers or sellers should seek by arrangements in their own interest to encroach on purchasers' rights, and to bind them by their own convention and practice, unknown to the public. A sale represents what is the intention of *both* parties. In case of manufactured products—such as (amongst others) meal and flour—some of the original components of the raw articles are removed, whether as useless or deleterious, or for the purpose of palate or fashion, though in such latter case the portions removed may be of value for nutrition or commercially. Thus, in ordinary wheat white flour, the germ is removed. Some years ago an agitation was started to have bread made by bakers with germ-flour, but the white loaves have prevailed. No one buying flour at a shop could complain that the nutritious germ had been taken away, and that he had thereby lost a useful nutritive element; for whether he knew or not that the germ was absent, or that it was valuable for food purposes, he would be getting what he proposed to buy, ordinary flour produced in the customary way. So of the preparation called "corn flour," which is produced as a well-known commercial article.

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(1) [1902] 2 K. B. 13.

Indian meal, for human food, has been manufactured for many years by abstracting the germ; and such meal differs in price from crude meal for animals, being much dearer. The article is in familiar use, and whether sold under a fancy name such as "Gem," or as the best Indian meal for human food, the purchaser would be getting what he demanded. If the germ has independent commercial value, its removal would tend to reduce the price of the prepared meal. I think that the justices overlooked the importance of the questions, what was the contract? and what was the Indian meal which the purchaser was entitled to expect he was getting? There is no evidence that he was misled. If this sale had been of Indian meal *simpliciter*, the case for the prosecution would be much stronger; but what was sold was Indian meal *for human food*, and there is nothing to show that any such meal contained the germ—or was understood to contain it—at least for many years past. The error in the Court below was in holding that the nutritive value alone was to be considered, and that the seller was under an obligation to explain the absence of the germ; whereas the true question was, whether the article corresponded with what was intended by both parties to be the subject of sale. Wholemeal bread is a more valuable food than baker's white bread; but fashion and taste have established the latter. The justices have misdirected themselves in point of law; and though the findings of fact are not precise, there is enough in the case to justify this Court in reversing the conviction instead of sending it back for more accurate findings. I construe the case as meaning that in commercial quality the article was what was intended to be the subject of sale, but that its deficiency in the oil element constitutes an offence under sect. 6. The analyst's certificate relates to what he terms "genuine Indian meal," that is natural Indian meal not specially prepared for human use. It is not directed to the peculiar commodity actually sold.

In M'Neill *v.* Carson & Co., the justices dismissed the charge, holding, rightly I think, that what was bought was the special preparation to which the analyst's certificate would be inapplicable.

In both these cases there was no prescribed obligatory standard, departure from which would make it the duty of the seller to make disclosure of the abstraction.

Solicitors for the appellant Hughes: *R. A. Mullan & Sons.*

Solicitor for the appellant M'Neill, and respondent Traynor: *H. J. Harris.*

Solicitor for the respondents Carson & Co.: *T. G. Menary.*

C. L.

IN RE MEAD.

Appeal.
1916.
Feb. 15, 16.

Bankruptcy—Debtor's Summons—Judgment against Debtor on Contract made during Infancy—Right to go behind Judgment.

Y., in an action tried before a jury, obtained judgment against M. for £65, the price of a horse sold to M. while an infant. M. had pleaded infancy in his defence, but had withdrawn the plea at the trial, and fought the case on the ground that the transaction was one of hiring, not of sale. Y. subsequently issued a debtor's summons against M. for payment of the amount of the judgment and costs. The judge in Bankruptcy, being of opinion on the evidence before him that the horse was not a necessary, dismissed the debtor's summons.

Held, by the Court of Appeal, that the Court of Bankruptcy had power to go behind the judgment, and inquire into the consideration; and there being evidence before the judge entitling him to find that the horse was not a necessary, he was right in dismissing the debtor's summons.

Ex parte Kibble; *In re Onslow*, L. R. 10 Ch. 373, applied.

In re Newey, 107 L. T. 832, distinguished.

APPEAL from an order of the King's Bench Division (in Bankruptcy) made by Boyd J., dismissing a debtor's summons issued by the appellants.

On the 23rd January, 1915, the appellants, James A. Young and Susan A. Young, had issued a specially endorsed writ against Alan Phillips Mead, a second lieutenant in His Majesty's regiment of the 16th Lancers, claiming £65, the price of a horse alleged to have been sold by the plaintiffs to the defendant and delivered on the 15th January, 1915. The writ was served on the defendant on the 12th April, 1915. An appearance was entered on the 19th April, 1915, and a defence was delivered on the 28th April, 1915, which set out as follows:—"1. The plaintiffs never sold or delivered to the defendant a horse as alleged. 2. The defendant never agreed to pay the plaintiffs the price charged in the particulars of the writ of summons, or any other price. 3. The defendant was at the time of the alleged sale an infant."

The plaintiffs' solicitors delivered a reply on the 29th May, 1915, joining issue on the statement of defence. Subsequently, on the 5th June, 1915, they served on the defendant's solicitors a notice as follows :—"Take notice that in the event of it appearing at the trial that the defendant was an infant at the time of the sale, the plaintiffs will apply to the judge at the trial for liberty to amend the reply by adding that 'the said horse was a necessary, and suitable to the condition of life of the defendant and to his actual requirements at the time of the sale.'"

The action was tried before Boyd J. and a common jury of the City of Dublin on the 14th June, 1915. During the course of the trial senior counsel on behalf of the defendant withdrew the plea of infancy pleaded in the 3rd paragraph of the defence, and the case was fought on the ground that the transaction was one of hiring, not of purchase. The questions left to the jury, and their answers, were as follows :—"1. Was there a concluded agreement for the purchase of the horse at the price of £65? Yes. 2. Was the purchase of the horse on the 14th January subject to the condition that the defendant should approve of the horse after hunting him on Saturday, the 16th January? No."

On these findings Boyd J. entered judgment for the plaintiffs for the sum of £65 and costs.

On the 22nd September, 1915, the appellants issued a debtor's summons against the respondent to enforce payment of the sum of £122 11*s.* 8*d.*, the amount of the above-mentioned judgment with costs. The respondent, by way of application to dismiss the debtor's summons, filed an affidavit stating that he was not indebted to the appellants in any sum amounting to £20. In a further affidavit he stated that at the date of the alleged sale, and also at the date of the issue of the writ, he was an infant, and did not attain the age of twenty-one years until the 6th April, 1915; that the horse was a hunter hired by him from the plaintiffs for the purpose of hunting it, with the understanding that if he liked the horse he would buy it for use as a hunter; that he was stationed at the Curragh at the date of the alleged agreement; that his pay at the time of the alleged sale was 6*s.* 6*d.* per diem; and that he received a voluntary allowance of £50, paid quarterly, from his father; and that save the said pay and allowance he had at the time of the alleged sale and still had no other means of support; that at the time of the alleged sale he was supplied with two chargers by the Government, and had no necessity for another horse, and that any other horse, whether for hunting or any other purpose, if purchased by him, would have been merely for his own amusement, and in no sense a necessary either for his own use or to enable him to fulfil his duties as an officer; that the withdrawal of the plea of infancy was because he preferred to fight the action on its merits, and thought it a sporting thing to do.

The appellants made an affidavit in which they stated:—"We say that the defendant stated in Court in answer to our counsel that he required the horse for hunting, as under a recent general order officers were not allowed to hunt their chargers, and he further stated that all the officers of his regiment hunted, and that no officer would be likely to remain in the regiment long unless he hunted with the rest. We are advised and believe that on the admitted facts of this case, even if the plea of infancy had been persisted in, it could have been defeated on the ground that in the particular circumstances of the case the horse came under the category of a necessary."

The respondent made an affidavit in reply, in which he stated:—"I refer also to paragraph 6 of the plaintiffs' affidavit, in which they further state that I swore in Court that I required the horse for hunting, as all officers of the regiment hunted, and no officer would be likely to remain in the regiment unless he hunted like the rest. I deny that I made any such statement, which is quite contrary to the facts. No officer is obliged to hunt, and fully half the officers in my regiment do not in fact hunt. I was, therefore, in no way obliged to hunt, and had I refrained from doing so, I would have been under no obligation to leave the regiment, nor would I have been called upon to do so."

The application to dismiss the debtor's summons was heard before Boyd J., on the 29th October, 1915, and he made an order dismissing it with costs. From a note of his judgment, taken by counsel for the respondent, it appeared that he held that the horse was not a necessary.

Fforde for the appellants:—

The Court of Bankruptcy can no doubt go behind a judgment even at the instance of the judgment debtor himself, if it was obtained by consent, default, fraud, or collusion: *Ex parte Kibble*; *In re Onslow* (1); *Ex parte Lennox* (2). But unless there has been consent, default, fraud, or collusion, or some miscarriage of justice (none of which elements exist in the present case), the Court will not inquire into the validity of the judgment: *In re Flateau*; *Ex parte Scotch Whiskey Distillers, Limited* (3), per Lord Esher M.R. (p. 85); per Lopes L.J. (p. 87). The judgment can be inquired into only where it is made out that it has been improperly or unfairly obtained: *In re Hawkins*; *Ex parte Troup* (4), per Lopes L.J. (p. 412). The issue in the present case having been fairly fought out before a jury, the Court cannot go behind the judgment given on their findings. A judgment is always conclusive where there has been a real fight between the parties: *Ex parte Banner*; *In re Blythe* (5), per James L.J. (p. 484). Where judgment is given in open Court against a person who is represented, the Court of Bankruptcy will not go behind it: *In re Howell* (6). In *In re Newey* (7), the Court refused to go behind the judgment, although it had been obtained in respect of a gambling debt. [Ronan L.J.: The decision there was based on the submission to arbitration and the award.] Here the parties agreed to let the question go to the jury, which is equivalent to a submission to arbitration.

If the plea of infancy had not been withdrawn, the plaintiff would have been entitled to have had submitted to the jury the question whether or not the horse was a necessary, and there was evidence on which they should have found that it was a necessary. The tests of what are necessaries are:—1. The contract must be for goods reasonably necessary for the infant's support in his station in life. 2. He must not have already a sufficient supply of these necessaries: *Nash* v. *Inman* (8), per Buckley L.J. (p. 12). Both these conditions were fulfilled in the present case. The debtor no doubt states that half the officers of his regiment do not hunt; but this may refer to officers now at the front. In *Clyde Cycle Company* v. *Hargreaves* (1) it was held that a racing bicycle might be a necessary for an infant earning twenty-one shillings per week. A light cart for an officer in the army, such as was used by nearly all the officers, was held to be a necessary: *Bernard* v. *Anon.* (2). Boyd J. had no power to determine that the horse was not necessary. When an article may be a necessary, even if of a luxurious character, it is for the jury to determine whether in the particular circumstances it is a necessary.

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(1) L. R. 10 Ch. 373.
(2) 16 Q. B. D. 315.
(3) 22 Q. B. D. 83.
(4) [1895] 1 Q. B. 404.
(5) 17 Ch. D. 480.
(6) 84 L. J. K. B. 1399.
(7) 107 L. T. 832.
(8) [1908] 2 K. B. 1.

FitzGibbon K.C. (with him *Oliver Murphy*), for the respondent:—

The judgment, so far as the question of infancy is concerned, was obtained by consent, and the principle laid down in *Ex parte Kibble* (3) with regard to a judgment by default, applies with even greater force to a judgment by consent against an infant. In *Kibble's Case* (3) the procedure was under sect. 7 of the English Bankruptcy Act of 1869, which corresponds with sect. 30 of our Act of 1877. The decision in that case has never been questioned. An infant cannot by any false pleading, or by any mistake in pleading, alter his status; his immunity remains notwithstanding: *Ex parte Jones* (4), per Lush L.J.

Boyd J. was right, on the evidence before him in the bankruptcy matter, in holding that the horse was not a necessary. In *Clyde Cycle Company* v. *Hargreaves* (1), Lord Russell points out that if the defendant there had bought a horse, it would not have been a necessary. In *Skrine* v. *Gordon* (5), although the defendant appeared to have £600 a year, it was held that a hunter could not be a necessary for him, and a verdict against him was set aside, and a verdict entered for him by the Court of Common Pleas.

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(1) 78 L. T. 296.

(2) Cited, 2 C. & P. 52.

(3) L. R. 10 Ch. 373.

(4) 18 Ch. D. 109, at p. 126.

(5) I. R. 9 C. L. 479.

Appeal.
1916.
In re MEAD.

SIR IGNATIUS J. O'BRIEN L C.:—

In this case we have not any note of the judgment of Boyd J., except that taken by Mr. FitzGibbon and Mr. Murphy. From that note, which I am satisfied is substantially accurate, it appears that the learned judge was of opinion that the debtor's summons should be dismissed on the ground that the judgment was not conclusive against the debtor, and that the consideration for the judgment was the price of a horse which was not a necessary for the debtor.

The case ~~has~~ been very fully argued, and everything that could possibly aid the Court in arriving at a decision in favour of the appellant has been placed before us by Mr. Fforde, but the Court, after giving the utmost weight to his argument, is of opinion that the decision of Boyd J. is right, and ought not to be disturbed.

The facts are quite short. The alleged debtor held a commission in His Majesty's regiment of the 16th Lancers, and was stationed at the Curragh. Having regard to the finding of the jury, we must take it that he agreed to purchase a horse from the alleged creditors. At that time he was under twenty-one years of age. An action was brought against him for the price of the horse, the writ being issued while he was still a minor. This, I have no doubt, was due not to any design on the part of the plaintiffs, but to ignorance of the true facts. The defendant was only two months over twenty-one when the action was tried. It was tried before Boyd J. and a jury, and the judge was therefore, of course, familiar with the details when the proceedings on the debtor's summons came before him.

The defendant contested the action on the ground that the transaction was one of hiring, not of purchase; but the jury found against him, and we must, as I have said, assume that he agreed to buy the horse. I wish to say, however, that I am satisfied that in relying on this defence the defendant acted in perfect good faith.

It appears that there was also a plea of infancy, and the reply did not allege that a horse was a necessary. At the trial the defendant, through his counsel, withdrew the plea of infancy, and consequently the vital question as to whether or not the horse was a necessary never came before the jury, and was never adjudicated on in the action. If there had been a finding that the horse was not a necessary, the plaintiffs could not possibly have succeeded, having regard to the Infants Relief Act. Mr. FitzGibbon is therefore, to my mind, absolutely right in saying that so far as that question was concerned the judgment was a judgment obtained by consent.

The withdrawal of the plea of infancy amounted, in my opinion, to all intents and purposes to a consent for judgment. No greater effect is given to the judgment by the fact that some of the questions in the action were tried, when the real, vital, and conclusive issue was withdrawn.

This being the position, we have to see what is the clear and settled jurisdiction of the Court of Bankruptcy.

In the case of *Ex parte Kibble* (1), a decision of the Court of Appeal in England, the authority of which, to my mind, has never been shaken, a judgment by default had been obtained against a man in respect of a bill of exchange given during infancy, and a debtor's summons was afterwards taken out. It was held that the Court of Bankruptcy would look into the consideration for the judgment, and that if the conduct of the debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by the 2nd section of the Infants Relief Act, 1874. The matter really hardly requires argument. The original debt being one for which there was no valid consideration, any attempt at ratification, whether by judgment or otherwise, would be invalidated by sect. 2 of the Act. If, by the device of a judgment, a debt contracted during infancy could be made available, which debt, apart from such judgment, could not be recovered, this would be a very simple means of destroying the effect of the section. The judgment of Sir G. Mellish L.J. is clear. He says (p. 378): "I am of opinion that that section [sect. 2 of the Infants Relief Act, 1874] applies to all contracts made by an infant, provided the ratification is made after the passing of the

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(1) L. R. 10 Ch. 373.

Act; and that it is to be understood as saying that a debt contracted in infancy shall not in future form a valid consideration on which an action can be brought. The statute in effect places a debt contracted during infancy in the same position as a gambling debt, and a bill of exchange given for a gambling debt cannot form the ground of an action. Even if the debtor does not plead that it was for a gambling debt, and lets the judgment go against him, still the Court of Bankruptcy would go behind the judgment and declare the debt void."

No doubt in that case the judgment was obtained by default, and on a narrow view of the jurisdiction of the Bankruptcy Court this might be said to differentiate that case from the present case; but I do not think it can be so differentiated, for, as I have said, in my opinion the withdrawal of the plea of infancy in the present case amounted to a consent by the defendant to judgment, apart from the question of whether or not the horse was a necessary, which question was never the subject of trial or adjudication until the Bankruptcy Court considered it. I think that the decision in *Kibble's Case* (1) is applicable to the present case, and that when the parties come before the judge of the Bankruptcy Court under sect. 30 of the Bankruptcy Act of 1872, and he considers, as he is entitled to consider, the question of whether or not the goods sold were necessaries, and arrives at the conclusion that they were not, and it is admitted that the contract was made during infancy, he must dismiss the debtor's summons, because there is no debt on which the summons or a subsequent adjudication upon it could be based.

It has been suggested that the decision in *Ex parte Kibble* (1), which was decided upon the section of the English Bankruptcy Act, 1869 (corresponding to sect. 30 of our Act of 1872), has been in some way cut down by the subsequent case of *In re Newey* (2), which came before the English King's Bench Division in Bankruptcy in the year 1912, under the procedure which at present regulates the bankruptcy practice in England. It was, as I have said, a decision of the King's Bench Division, and I could not listen to the suggestion that it could in any way overrule the clear judgment of the Court of Appeal in *Kibble's Case* (1).

(1) L. R. 10 Ch. 373.

(2) 107 L. T. 832.

In *Newey's Case* (1) there had been a submission to arbitration in respect of a dispute between the debtor and the creditor over the state of the account between them in respect of some betting transactions. The matter had been submitted to the committee of Tattersall's, who made an award that a sum was due to the creditor. The creditor sued the debtor on this award in the County Court, where the defendant succeeded upon a plea of the Gaming Act; but upon appeal to the Divisional Court it was held that there was a new contract set up by the award, and that the plaintiff was entitled to succeed. The plaintiff accordingly obtained judgment, and subsequently took proceedings in bankruptcy. At the hearing of the petition the debtor sought to go behind the award, but the registrar refused to allow him to do so, and his decision was upheld by the King's Bench Division. That case, as I have said, does not seem to me to interfere at all with the decision in *Kibble's Case* (2), and if it did, I should not follow it; but it seems to me that it does not conflict with *Kibble's Case* (2), as there had been nothing equivalent to judgment by default.

The facts in the present case lie on the surface. The alleged debtor was a minor when the transaction took place, and in my opinion, so far as the real issue was concerned, the judgment was a consent judgment. This being so, then apart from the question of the horse being a necessary, there could be no consideration for the judgment, and it was the duty of the judge of the Court of Bankruptcy to consider and determine, and Mr. Justice Boyd did consider and determine, the question whether or not this horse, which was found by the jury to have been purchased, was a necessary.

The evidence on this point relied on by the creditors consists of a statement which they alleged was made at the trial by the debtor, that he required the horse for hunting, as under a recent general order officers were not allowed to hunt their chargers; that all the officers of his regiment hunted, and that no officer would be likely to remain in the regiment long unless he hunted like the rest, and they contended that, accordingly, it must be assumed that this horse was a necessary. The debtor has made an affidavit denying that he made any such statement, and alleging that no officer is obliged to hunt, and that fully half the officers of his regiment do not in fact hunt. In another affidavit he says:—"I am supplied, and was at the date of the sale supplied, with two chargers by His Majesty's Government, and have, and had at the time of the alleged sale, no necessity for another horse, and any horse, whether for hunting or any other purpose, if purchased by me would have been, and would be, merely for my own amusement, and would be and would have been in no sense necessary either for my own use or to enable me to fulfil my duties as an officer."

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(1) 107 L. T. 832.

(2) L. R. 10 Ch. 373.

Accordingly, there was evidence before Boyd J., which if he believed it to be true—and I assume that he did believe it to be true—showed that there was no regimental obligation on this young officer to keep a hunter in addition to the two chargers he was allowed. Once this supposed obligation is eliminated, the position of the alleged debtor was such that it is obvious that this hunter was not merely a luxury, but a luxury which he could not afford having regard to his means.

In *Skrine* v. *Gordon* (1) the defendant, an infant, appeared to be in a good position, giving out that he had an allowance of £600 a year. He agreed to purchase a hunter at the price of £150. An action having been brought against him to recover this amount, it was held by the Court of Common Pleas that there was no evidence fit to be submitted to a jury that a hunter was a necessary for the defendant. Lawson J., who delivered the judgment of the Court says:—"Of course we all know that hunting is good sport and a manly exercise, but still that only shows it is a sport, and luxuries or amusement are quite distinct from necessaries. We are, therefore, of opinion that the rule should be made absolute for entering up a verdict for the defendant."

Now, without laying down that under no circumstances could a hunter be a necessary, I am of opinion that Boyd J. was entitled to hold, on the evidence before him in the present case, that the hunter was not a necessary, but a luxury, and was right in dismissing the debtor's summons.

(1) I. R. 9 C. L. 479.

Appeal.
1916.
In re Mead.

Ronan L.J.:—

I am of the same opinion. The rule in bankruptcy is that the debts provable against the bankrupt must be legal debts and not debts of honour. If a judgment is produced in bankruptcy proceedings, the Court of Bankruptcy has no power to set it aside, but it may look into the circumstances to see whether or not there is any real debt behind it, and if there is not, the Court will not adjudicate in respect of it. This appears to me to be settled by *Kibble's Case* (1), the principle of which, so far as I can see, has never been questioned.

Mr. Fforde relies on *In re Newey* (2). If the judgment in that case had been simply for the amount of the gambling debts, the defendant not relying on the Gaming Acts, and it had been held that the Court of Bankruptcy could not go behind the judgment, the case would certainly appear to have been inconsistent with *Kibble's Case* (1). But that is not the ground upon which *Newey's Case* (2) was decided. There had been a dispute between the plaintiff and the defendant as to the amount due by the defendant to the plaintiff. The parties were at perfect liberty to enter into a contract that upon that dispute they would submit to the arbitration of A. B. the question of what sum the defendant owed to the plaintiff, and if A. B. had decided that a gambling debt was a legal debt, the fact that he had made a mistake in law would not have affected the validity of his award. In *Newey's Case* (2) the transaction arose out of gambling debts, and the parties consented to abide by the decision of the committee of Tattersall's as to the amount due. The committee went into the matter, and decided that Newey owed Whiteman £37. The effect of this was to remove the case entirely from the category of gambling debts, and make it a debt due on valid award. Counsel for Whiteman, in arguing that the judgment could not be investigated, says: "A judgment on an award is analogous to a judgment by consent." The Court, however, did not take that view. Phillimore J. says: "If in this case we were to re-open the award on which the judgment has been obtained, we should be carrying the doctrine of going behind

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(1) L. R. 10 Ch. 373.

(2) 107 L. T. 832.

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judgments to an extreme never contemplated in any of the decisions on the point. The authorities decide that where judgment has been obtained either in default of appearance of the debtor or by his consent—even his reasoned consent—the Court of Bankruptcy may still go behind that judgment, and inquire into the true facts lying behind. If it were not so, a debtor might defraud his creditors by allowing a number of bogus claims to go against him by default. But this doctrine, carried to its most extreme conclusion, will not cover the case." Then, after referring to the dispute between the parties, the reference to arbitration and the award, and the judgment obtained on that award, he says: "But the submission to arbitration altered the rights of the parties. We are now only concerned with the rights of two persons who have agreed to submit a dispute to arbitration and have agreed to pay whatever sums the arbitrator shall decide to be due. That arbitrator has decided that a certain sum is due from one to the other, and, unless it can be shown that he acted wrongly or fraudulently, a valid contract has been set up, and on that contract a valid judgment has been given, which this Court cannot now disturb."

I fail to see what bearing that case has upon *Kibble's Case* (1), or the present case. In *Newey's Case* (2) there was a legal debt created by the contract of the parties to submit the dispute to arbitration, and the award in pursuance thereof. In the present case, admittedly, in order to make the debt a legal debt, it must be shown that the hunter was a necessary. Mr. Fforde asks us to hold that on the evidence Boyd J. was bound to hold that it was a necessary. I find it impossible to accept the suggestion that in the present case a jury could not find that a hunter was not a necessary for this gentleman, who had about £3 a week, and I see no reason for not accepting the judgment of Boyd J. that it was not a necessary.

MOLONY L.J.:—

The defendant is a young officer in the 16th Lancers, with an income of £3 a week. When he was a minor he was sued for the price of a horse. The defendant pleaded that he had only hired the horse, not purchased it, and he also put forward the plea of

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(1) L. R. 10 Ch. 373.

(2) 107 L. T. 832.

Appeal.
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Molony L.J.

infancy. At the trial the defendant withdrew the plea of infancy, and fought the case on the merits, with the result that the jury found that he had purchased the horse, and judgment was accordingly entered against him.

Upon this judgment the plaintiff now seeks to make a bankrupt of the defendant, and the defendant seeks to rely upon his infancy.

It cannot be doubted that the Court of Bankruptcy has jurisdiction to look into the consideration for the judgment: *Ex parte Kibble* (1); and I agree with the other members of the Court that the authority of that case is in no way lessened by the case of *In re Newey* (2), upon which Mr. Fforde so strongly relied.

It is next contended that if we inquire into the consideration for the judgment, we shall find it in the fact that a horse for hunting purposes is a necessary for a young officer. Mr. Fforde contended that it would be impossible for the defendant to remain long in his regiment unless he hunted like the rest of the officers, and that consequently a hunter was a necessary for him.

The defendant was allowed the use of two chargers, and he swears that there was no obligation upon him to keep a hunter in addition, and that many officers do not do so.

I do not think that under any circumstances a hunter can be deemed a necessary for a young officer with an income of £3 a week, and that consequently the judgment of Mr. Justice Boyd in this case was right, and ought to be affirmed.

Solicitors for the appellants: *Brown & McCann.*

Solicitors for the respondent: *Moore, Keily, & Lloyd.*

J. G. T.

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(1) L. R. 10 Ch. 373 (2) 107 L. T. 832.

H. L.
1915.
Dec. 10.

HOLLINSHEAD, APPELLANT; HAZLETON, RESPONDENT.

Bankruptcy — Member of Parliament — Annual Payment to — Salary or Income — Appropriation for Benefit of Creditors — Bankruptcy (Ireland) Amendment Act, 1872 (35 *&* 36 *Vict. c.* 58), *s.* 51.

APPEAL from the judgment of the Court of Appeal reported [1915] 2 I. R. 425, *sub nom. In re* RICHARD HAZLETON, a Bankrupt.

Healy K.C., and *Hanna K.C.* (with them *D. B. Sullivan*), for the appellant.

Henry K.C., and *Hugh J. M'Cann* (with them *Thomas Scanlan*, of the English Bar), for the respondent.

The House of Lords (Lord Atkinson, Lord Shaw of Dunfermline, Lord Parker of Waddington, and Lord Sumner) reversed the order of the Court of Appeal (1).

Solicitors for the appellant: *Munton, Morris, King, Gavan Duffy, & Co.*, for *William V. Seddall.*

Solicitors for the respondent: *Herbert Z. Deane*, for *J. L. Scallan & Co.*

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(1) [1916] A.C. 428.

KINLEN, Appellant; ENNIS URBAN DISTRICT COUNCIL, Respondents (1).

H. L.
1915.
Nov. 9.

Contract—Construction—Reference to prior Document—Building Contract—Right to refer to Tender not incorporated in Contract — Architect's Certificate—Certificate work completed with exception of a Wall—Wall held not to be included in Contract—Sufficiency of Certificate.

The respondents had adopted a scheme for the erection of artisans' dwellings, and had, for the purpose of obtaining tenders, prepared a specification with a form of tender attached. The appellant sent in a tender on the form attached to the specification, and his tender was accepted. Subsequently, a contract under seal was entered into between the appellants and the respondents. This contract, after reciting the tender, the specification, and certain drawings, and expressly incorporating the specification and drawings, provided that the works should be constructed agreeably to the specification and drawings.

Held, the contract being unambiguous in itself, that the tender could not be referred to for the purpose of showing that a certain wall at the rear of the dwellings was included in the work to be done.

The contract provided for a certain amount of the contract price being retained by the respondents until their architect had given his certificate of the satisfactory completion of the contract; and also that any disagreement connected with the quality of the materials, execution of the works, or meaning of the plans should be decided by the respondents' architect, whose decision should be final. The specification provided that the respondents' architect should be the sole arbitrator between the council and the contractor as to the quality of the materials and workmanship, or any other matter, should a dispute arise, and that his decision should be final. The respondents' architect had given a certificate that the appellant had completed the contract to his satisfaction, with the exception of building the wall in question.

Held, a sufficient certificate to entitle the appellant to recover.

Appeal from an order of the Court of Appeal in Ireland reversing an order of the King's Bench Division that judgment be entered for the plaintiff (the appellant in this appeal) for the sum of £235 8*s.* 2*d.*, over and above a sum of £310 lodged in Court, and in lieu thereof ordering judgment to be entered for the defendants (the respondents herein) with costs.

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(1) *Present*: Lord Buckmaster L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Parker of Waddington, and Lord Sumner.

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The action was brought by the appellant, as plaintiff, against the respondents, as defendants, to recover a sum of £380, balance due on foot of a contract between the plaintiff and the defendants for the erection by the plaintiff of thirty artisans' dwellings in the town of Ennis, together with a sum of about £1000 for extras, and £500 for certain damages claimed. The main dispute between the parties was as to whether or not the plaintiff was bound by the contract to erect a wall at the rear of the houses along a boreen.

The action was tried before Madden J. and a special jury of the City of Dublin on the 15th June, 1914, and following days, when the following matters were proved or admitted:—

The defendants had adopted a scheme for the erection in the town of Ennis of artisans' and labourers' dwellings, and had advertised for tenders for their erection, and prepared a specification, with a form of tender attached. This specification was headed:— "General Conditions of Contract and Specification of Work and Materials to be Employed in the Erection and Completion of Eight Blocks of Workmen's Dwellings for the Urban Council of Ennis." This was followed by another heading:—"Conditions and Specification of Materials and Workmanship to be Employed in the Erection and Completion of Workmen's Dwellings for the Urban Council of Ennis." The specification contained (amongst others) the following provisions:—

"The tenders to be on the forms attached at the end of this specification, and must state separately the cost of the several alternative details embodied in same."

"It is proposed to erect under present contract thirty cottages for artisans on plot opposite the Court House, having a frontage on the Gort Road, and which will be referred to in this specification, where necessary to define the work not applying to labourers' cottages, as Design 'A'; and it is proposed to erect forty-six cottages for labourers on the Clare Castle Road site, and which will be referred to as above as Design 'B.'"

There was a provision that the works were to be carried out as might be directed by the engineer of the Urban Council or other competent person appointed by them, and to his entire satisfaction.

Under the heading "Specification for Road, Water Supply, &c.,

Separate Estimate," it was provided: "Construct wall at rear of Design 'A' along Boreen, 540 feet long by 6 feet by 18 inches, of rough rubble masonry. Put semi-circular concrete capping to same."

The last two paragraphs of the specification provided:—

"The whole of these works to be carried out to the requirements of the engineer. The conditions of contract and specification for the cottages are applicable to this contract in every respect."

"The engineer to be the sole arbitrator between the council and the contractor, or contractors, as to the quality of the materials or workmanship, or any other matter, should any dispute in connexion with them arise from time to time, whose decision on all matters shall be final and binding on all parties."

The plaintiff sent in a tender, dated the 7th August, 1911, on the form attached to the specification. The portions of this tender, so far as material to the present report, were as follows:—

"Tender for works to be done in erecting and completing the proposed blocks of Artisans' and Labourers' Dwellings for the Urban District of Ennis.

"I propose and agree to execute the above works in strict conformity with plans, specification, conditions of contract, and such further drawings, instructions, and conditions as may be given, finding all necessary labour and materials, for the several sums set forth as under:—

"(1) To erect and complete three blocks, of ten each, artisans' dwellings, yards, out-offices, sewerage, water connections from service pipe, rear wall, demolish old houses, &c., as per Design "A" for the sum of £5880."

"(3) To erect and complete the dwellings, yards, out-offices, sewerage, and water connections from service pipe in connexion with each block, as follows:—(A) Block No. 1, on Design 'A,' for the sum of £1960. (B) Block No. 2, on Design 'A,' for the sum of £1960. (C) Block No. 3, on Design 'A,' for the sum of £1960."

"(4) To demolish old houses and build wall at rear of Design 'A' for the sum of £270."

The plaintiff's tender to execute the works comprised in Design "A" for the sum of £5880 was accepted by the defendants, and a contract under seal, dated the 4th September, 1911, was entered into between the plaintiff (therein referred to as "the contractor") and the defendants (therein referred to as "the council"). It recited:—"Whereas the council have with the consent of the Local Government Board for Ireland adopted a scheme for the erection in the town of Ennis of artisans' and labourers' dwellings under the provisions of the Housing of the Working Classes Act, consisting of thirty artisans' dwellings which are described as Design 'A,' and forty-six labourers' dwellings, which are described as Design 'B' in the said scheme. And whereas plans, drawings, and elevations of the said dwellings and specifications of the works to be done and of the materials to be provided for, and for the building of the same, have been prepared by Mr. Martin Tierney, civil engineer and architect to the council for the said scheme, and have been approved of. And whereas the contractor has by tender, dated the 7th day of August, 1911, agreed to execute the said works comprised in Design 'A' for the sum of £5880 sterling, which said tender was accepted by the said council on the next succeeding date. And whereas the said plans, drawings, elevations, and specifications have been signed by the contractor, and are to be taken as incorporated with and forming part of the agreement." The operative part of the agreement contained (amongst others) the following provisions:—

"1. The several works will be constructed in all respects agreeably to the specification and in conformity with the accompanying drawings" (1). "11. Any disagreement or misunderstanding that may arise in all cases connected with the quality of the materials, execution of the works, or meaning of the plans or specifications shall be decided by the architect or other person appointed by the council, whose decision shall be final and conclusive." "18. No payment will be considered legally becoming due to the contractor until the completion of the contract, but advances will be made to him of sums not less than £250 sterling at each payment at such times as the architect or such other person appointed for the time being by the council shall certify for, not

(1) As to the nature of these drawings, see judgment of Lord Buckmaster L.C., *post*, pp. 307, 308.

exceeding 80 per cent. of the value of the work done, the balance being retained without interest to form a reserve fund until such balance shall amount to £150 sterling for each block of dwellings, and until the architect or other person so appointed shall have given his certificate of the satisfactory completion of the contract, when such balance is to be paid as follows:—Two-thirds thereof shall at the expiration of two months after the completion of the contract, that is, after being taken up from the contractor by the architect or other person so appointed as aforesaid, and the remaining one-third shall be paid at the expiration of six months after the completion of the contract as aforesaid, and will be subject to any deductions which may be made for non-compliance with the specifications."

The plaintiff commenced the works, and was paid by the defendants from time to time during the progress of the works in respect of the contract price sums amounting to £5050. In March, 1913, a dispute arose between the plaintiff and the defendants as to whether or not the plaintiff was bound to construct the wall at the rear along the boreen, the plaintiff contending that this was not included in the contract.

On the 6th September, 1913, the defendants' architect gave the following certificate to the plaintiff:—"I hereby certify that Mr. P. J. Kinlen has, with the exception that he has not demolished the old houses or built the rear wall, completed the contract to my satisfaction entered into by him in September, 1911, with the Ennis Urban District Council, to erect and complete the works comprised in what is known as Design 'A' of the Council's Scheme for the erection of houses under the Housing of the Working Classes Acts in the urban district."

The plaintiff persisted in his refusal to construct this rear wall, and on the 23rd October, 1913, the defendants took possession of the works and subsequently erected the wall at their own expense.

The writ in the present action was issued on the 30th October, 1913. The sum of £380 claimed as due under the contract represented the balance of the contract price of £5880, after deducting the sum of £5050 already paid to the plaintiff, and the sum of £450 which the defendants were entitled to retain for the periods mentioned in clause 18 of the agreement.

At the trial of the action the defendants applied for a direction on the ground that the construction of the boreen wall was part of the contract, and that as the contract was not completed no action lay. Madden J. refused such direction, holding that the making of this wall was not included in the works for the construction of which the plaintiff's tender had been accepted. He left certain questions to the jury in respect of extras and damages claimed, not material to the present report, and having taken the findings of the jury as to these, gave judgment for the plaintiff for the sum of £331 7s. 2d., over and above a sum of £310 which had been lodged in court by the defendants with a defence denying liability.

The defendants applied to the King's Bench Division (Cherry L.C.J., and Kenny and Molony JJ.) to have the judgment for the plaintiff set aside and judgment entered for the defendants, or in the alternative to have the judgment, so far as it comprised extras, reduced if not wholly set aside. The plaintiff served a cross-notice of application for a new trial, or alternatively to have judgment for an increased amount entered. The King's Bench Division held that the view of Madden J. as to the construction of the contract with regard to the building of the rear wall was correct, but reduced to £235 8s. 2d. the amount for which judgment for the plaintiff was to be entered, on the ground that in respect of the extras the plaintiff, having regard to one of the provisions of the contract, could recover only the sums sworn to as their value by the defendants' architect.

The defendants appealed to the Court of Appeal (O'Brien L.C., Palles C.B. and Moriarty L.J.) The Court of Appeal being of opinion that for the purpose of construing the contract the tender of the plaintiff might be looked at, and that on this principle of construction the contract bound the plaintiff to erect the wall at the rear, discharged the order of the King's Bench Division and ordered judgment to be entered for the defendants with costs.

From this order the present appeal to the House of Lords was taken.

Hanna K.C., and *Ronayne* (with them *Thomas Scanlan*, of the English Bar), for the appellant.

Serjeant Sullivan K.C., and *Carrigan K.C.* (with them *Hugh Kennedy*), for the respondents.

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Lord Buckmaster L.C. :—

My Lords, notwithstanding the very full and persuasive argument of the respondents in this case, I am of the clear opinion that the appeal should succeed. I cannot help thinking that the judgments of the Court of Appeal have gone astray owing to the judges failing to avail themselves of one of the most clearly defined and salutary rules of evidence known to the Courts; I refer to the rule which excludes from the construction of a written document the consideration of other preliminary documents or discussions which lead up to and are intended to be gathered up, included, and explained in the written document itself.

My Lords, the value of that rule is very well illustrated by the present case, which arises under these circumstances. The Ennis Urban District Council, in 1911, were preparing to carry out a scheme for the construction of labourers' and artisans' dwellings. It was said by counsel for the respondents, and I have no doubt it is accurate, that the labourers' dwellings were to be provided for a rural district, and the artisans' dwellings for an urban district. It is with the artisans' dwellings, and with those alone, that the present dispute is concerned. These dwellings were to consist of three blocks of ten each, or thirty in all; and for the purpose of obtaining offers to carry out the work connected with their erection, the Ennis Urban District Council caused certain specifications and a form of tender to be prepared. The form of specification is important. It was divided under two perfectly clear and distinct heads both grouped under the general conditions which were described as: "General Conditions of Contract and Specification of Work and Materials to be employed in the Erection and Completion of eight Blocks of Workmen's Dwellings for the Urban Council of Ennis." The first head was in the following terms:—"Conditions and Specification of Materials and Workmanship to be employed in the Erection and Completion of Workmen's Dwellings for the Urban Council of Ennis." It then proceeded to refer to the tenders that it was desired to obtain, and continues in this form:—"It is proposed to erect under present contract thirty cottages for artisans on plot opposite the court-house, having a frontage

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on the Gort Road, and which will be referred to in this specification, where necessary to define the work not applying to labourers' cottages, as Design 'A'; and it is proposed to erect forty-six cottages for labourers on the Clare Castle Road site, and which will be referred to as above as Design 'B.'" It is obvious, from what I have already stated, that the subject-matter of the present appeal is connected with the houses that were included in Design "A." The importance, therefore, of that statement which I have read as to the meaning of Design "A" is, that it does not appear at the head of the specification before it was sub-divided, but it appears in that part, and that part only, of the specification which deals with the erection of the dwellings. At a later part of the same document there comes an entirely distinct and separate heading called:—"Specification for Road, Water Supply, &c." "Separate Estimate." The only material clause in that separate estimate is one in these terms:—"Construct wall at rear of Design 'A' along boreen, 540 feet long by 6 feet by 18 inches of rough rubble masonry. Put semi-circular concrete capping to same." It is perfectly plain, therefore, that the Ennis Urban District Council had, by their specification, divided the work that they desired to have completed under two perfectly clear, perfectly separate and distinct heads, the one relating to the construction of the dwellings strictly and properly defined, and the other to a totally different piece of work, that of building a wall at the back of the land on which the cottages were to stand. In those circumstances there was a tender made by the appellant upon the form affixed to the specification, and this was accepted by the respondents, and was followed by a formal contract under seal. The contract is dated the 4th September, 1911, and upon its true construction the whole of the dispute in this case depends.

Now, my Lords, if in considering that contract it were found that it depended upon the tender, that is to say, that the contract in terms bound the builder to perform the work for which he had tendered, or if the contract was so ambiguous, or the tender was so involved in its construction, that it was impossible to understand what was intended without investigating the tender for that purpose, it might well be that the tender would need to be regarded. But I can find no such difficulty in the contract. It begins with the following material recitals:—"Whereas the council have with the consent of the Local Government Board for Ireland adopted a scheme for the erection in the town of Ennis of artisans' and labourers' dwellings under the provisions of the Housing of the Working Classes Acts, consisting of thirty artisans' dwellings which are described as Design 'A,' and forty-six labourers' dwellings which are described as Design 'B,' in the said scheme. And whereas plans, drawings, and elevations of the said dwellings, and specifications of the works to be done and of the materials to be provided for, and for the building of same, have been prepared by Mr. Martin Tierney, Civil Engineer and architect to the council for the said scheme, and have been approved of. And whereas the contractor has by tender, dated the 7th day of August, 1911, agreed to execute the said works comprised in Design 'A' for the sum of £5880 sterling, which said tender was accepted by the said council." The most important recital is the one which recites the agreement to execute the works in Design "A," for it is upon that that the whole contract depends.

In my opinion there is no difficulty in determining what was the scope and ambit of the works which were comprised in Design "A," which is within the meaning of that contract defined in that part of the specification which relates only to the dwellings. Further, there follows in the first clause of the contract the obligation to perform the work, which is in these terms:—"The several works will be constructed in all respects agreeably to the specifications and in conformity with the accompanying drawings." These drawings consisted of a plan of a house with a yard at the back headed Design "A," and attached to that was a block plan showing the total number of the houses and the three blocks into which they were to be divided. The block plan showed further behind the rear wall of the tenements some open spaces that were divided into plots and appear to be bounded themselves again by a wall or fence. There is nothing whatever upon these plans to identify the wall which was the subject of the separate specification to which I have referred. There is no line upon the plan that agrees with the length that is mentioned in the specification, nor is there any part whatever of the working plans that shows the dimensions of the wall or the method of construction by which it is to be built. On the other hand, we find that when we deal with the walls that are at the back of the yards of the tenements, the subject of the contract, there is a perfectly clear wall shown defined in position and thickness. So far as these plans are concerned, and so far as the design is elucidated by their assistance, there is nothing whatever to show that the Design "A" included the building of the wall which was the subject of the separate estimate in the original specification.

Then it is said, "But in point of fact, although it is not shown upon the plan, yet Design 'A' must be treated not as a design for certain buildings, but as a general scheme," and that if you consider that scheme you find that part of the scheme was to build this wall at the back of the open piece of land that lay between the rear walls of the cottages and the road which is known as the boreen.

Now, my Lords, for the purpose of supplementing that argument, reference has been made to the document I referred to just now, called the tender; and, indeed, unless the tender is introduced into the discussion, it would, I think, be impossible to show that that wall was intended to be included. For the reasons I have already given, I think it would be very dangerous indeed to stray away from the plain terms of the contract for the purpose of seeing what it was that had been the subject of the tender, and that for this reason: when the tender is looked at, two things become clear; the one is that there are to be separate tenders for the construction of the wall and for the construction of another part of the work which on the one hand it is suggested is strictly confined to the cottages, and on the other is said to include the cottages and the wall as well. The tender itself, when read in connexion with the specification, is, I think, a document that might well mislead a man; and without attempting to define what its true meaning is, I think it is sufficient to say that its investigation affords a good reason for relying upon the rule that the statement as to what the parties meant when the tender was made and accepted is to be extracted from the contract which the parties subsequently made to carry their meaning into effect. It is perfectly possible that the builder in tendering may have had one thing in his mind, and the Urban District Council may have had another. Their intentions are made plain, and their minds are brought into unison, by the contract which both parties signed. If the contract does not carry out what either of the parties is prepared to assert was the actual agreement, it is open to the party who is dissatisfied to seek to have it rectified; but it is not open to either party, for the purpose of showing that the contract possesses a different meaning from that which upon the face it bears, to have reference to other documents, which, in this case at any rate, only increase and do not relieve the ambiguity. My Lords, therefore, in my opinion this contract should not be interpreted by the assistance of any other documents than those which are expressly incorporated with it; and, so interpreted, it appears to me that there was no obligation whatever upon this builder to build the wall which is the subject of this dispute.

Then, my Lords, there is one further point that was urged by counsel for the respondents here, which I think only needs slight consideration. He says that a certificate by the architect that the work was completed was a condition precedent to the claim for payment under the contract, and for that purpose he relies upon clause 18 of the contract, which is the only clause which provides for payment. That clause is in these terms:—"No payment will be considered legally becoming due to the contractor until the completion of the contract, but advances will be made to him of sums of not less than £250 sterling at each payment, at such times as the architect or such other person appointed for the time being by the council shall certify for, not exceeding 80 per cent. of the value of the work done, the balance being retained without interest to form a reserve fund until such balance shall amount to £150 sterling for each block of dwellings, and until the architect or other person so appointed shall have given his certificate of the satisfactory completion of the contract, when such balance is to be paid as follows." He also referred to the fact that any disagreement or misunderstanding is to be settled by the architect, by clause 11, and to the fact that by the specification itself, in the last clause of all, the engineer is to be the sole arbitrator, and by another clause it is provided that the works are also to be carried out as may be directed by him and to his entire satisfaction.

Now, my Lords, it may be accepted that the architect was the sole arbiter of whether the work had been properly done in accordance with the contract or not, but that appears to me to carry the respondents but a short distance in this case, because, in fact, the engineer has given a certificate. That certificate was given on the 6th September, 1913, and it is in these terms:—"I hereby certify that Mr. P. J. Kinlen has, with the exception that he has not demolished the old houses or built the rear wall, completed the contract to my satisfaction." I read that certificate in this way:—"A dispute has arisen between the council and the builder as to whether the wall is within the contract or not. The wall, in fact, has not been completed. If it be within the contract, then that contract is not performed. Whether it be within the contract, or whether it be not, I do not determine, but I say that, with the exception of that item, the work has been properly performed."

My Lords, in the view that I have formed, that work did not form, and never had formed, any part whatever of the contract, and it consequently follows that the architect's certificate was perfect in substance and form, and there is no difficulty placed in the way of the appellant by reason of any failure on the part of the architect to certify. For these reasons, I think the appeal should be allowed, and the judgment entered by the King's Bench Division should be restored.

LORD ATKINSON:—

My Lords, I concur, and I have nothing to add.

LORD SHAW OF DUNFERMLINE:—

My Lords, I also concur. In my opinion this agreement does not contain in itself any ambiguity which compels a Court of Law to refer to previous writings.

My Lords, the rule upon this topic is elementary. It has been settled by a body of authority, of which the case in this House of *Lee* v. *Alexander* (1) is a fair and leading example, that where you have a contract entered into by parties which even expressly bears to be in implement of a previous contract, the later supersedes the previous contract *in toto*. Whether with regard to real or to movable estate or ordinary bargain, the adjusted final conveyance or the ultimate agreement becomes the sole measure of the rights and liabilities of the contracting parties.

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(1) 8 A. C. 853.

My Lords, I might parenthetically add that I do not myself at present see that, although I had thought a reference to the antecedent document which is called the tender had had to be made by me, I should have come in the result to any different conclusion. Further, where a sealed contract has been entered into by a public body, which sealed contract is the measure of the liabilities of that public body, it must also (barring ambiguity) be the measure of its rights. In the present case, my Lords, I have looked with anxiety, in view of the interesting argument presented for the respondents, to see whether the conditions and specification, which are undoubtedly adopted in this actual contract, give any colour to the suggestion that that specification itself embraced the work which is the subject of the action. My Lords, the specification refers to Design "A." An astute attempt was made to say that Design "A" was a scheme and not a piece of paper. Design "A" is just a design upon paper and just what it calls itself; we have all seen it, and I am of opinion that there is no indication upon Design "A" of a wall which was to be at the back of these premises and running alongside the boreen. Another wall, the yard wall, was there on Design "A"; it was measured, its height was stated. There is a distinction upon the specification between the boreen wall and that yard wall in three respects: the material of the boreen wall was different, its dimensions were entirely different, and there never was a drawing to which people could work under any name of a "design."

My Lords, I would desire respectfully to adopt the judgment of Mr. Justice Molony in this case, as distinguishing between what the specification does provide for and what it does not. He says: "The specification shows that there was to be a separate estimate for the wall along the boreen, and it states that this wall was to be constructed 'at the rear of Design "A"' but does not purport to be a part of the contract for Design 'A,' and implies that it is not, by stating that the 'conditions of the contract and specification for the cottages are applicable to this contract in every respect.'" It appears to me, my Lords, that that completely

Lord Shaw of Dunfermline.

covers the entire case which has been made in argument in support of this appeal. I think the judgment of the Lord Chief Justice, and in particular the judgment of Mr. Justice Molony, ought to be affirmed by this House.

I desire upon the subject of arbitration to make two observations in view of the argument which we have heard. In the first place, my Lords, I should be extremely slow to admit such an argument at this stage of the case. It appears to me to be of the worst example that an argument of that kind, which would cut down to the root of the action, should be allowed to be proposed at the Bar of your Lordships' House. Before assenting to that view, I should desire to be satisfied that the Courts whose decisions are under review had had before them a crisp and plain plea to the effect that this action was excluded by reason of the award made by an arbiter. That has not been done in the pleadings or in the Court below, and the contract of litis-contestation has been carried up to the Bar of this House without it. The citation of a public statute—previously omitted in the proceedings—may of course be a different matter, but in the ordinary case this House is, as it ought to be, extremely slow to admit fresh matter.

On the subject of the arbitration plea itself, I would only in conclusion say that I do not think it has a good foundation in the terms of clause 11 of the contract. That clause provides that any disagreement or misunderstanding that may arise connected with the quality of the materials, or the execution of the works or any of the plans or specification, shall be decided by the architect. My Lords, there is no clause remitting to the arbitrament of this gentleman a decision as to the meaning of the contract itself. Until, in short, there has been postulated this fact, that the works executed are executed under this contract, there is no occasion for calling upon this gentleman, whose jurisdiction does not begin until he has to determine a matter with regard to the execution of the works under the contract.

LORD PARKER OF WADDINGTON :—

My Lords, I concur.

LORD SUMNER :—

My Lords, I concur.

H. L. 1915. KINLEN v. ENNIS URBAN DISTRICT COUNCIL.

Judgment of the Court of Appeal reversed and order of the King's Bench Division restored.

Solicitor for the appellant: *Herbert Z. Deane*, for *Charles P. O'Neill.*

Solicitors for the respondents: *Dyson & Co.*, for *James Lynch.*

THE KING (DARCY) *v.* THE JUSTICES OF COUNTY CARLOW (1).

K. B. Div. 1915. Sept. 30. Nov. 5. *Appeal.* 1916. April 5.

Justices—Application for Order to enter Land to dig for Road Materials—Orchard—"Orcharding out"—Necessity of proof by Applicant that Land is not an Orchard—Certiorari—Conclusiveness of Decision of Justice that Land is an Orchard—Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *s.* 162.

The prosecutor, a road contractor, applied to a magistrate at petty sessions for an order under s. 162 of the Grand Jury (Ireland) Act, 1836, to enter a field in the occupation of D., and dig for and carry away road materials. He gave evidence that these materials could not conveniently be procured elsewhere. D. gave evidence to show that the field was an orchard, fruit-trees having been planted on it by him some time before the application, admittedly with the object of preventing an order to enter being made. The magistrate held on the evidence that the field was an orchard, and made an order, "Application refused, without costs." The prosecutor applied for a writ of certiorari to quash this order on the ground that the field was not an orchard, and that D., in planting portion of the field, did not bona fide intend to create an orchard.

Held, by the King's Bench Division (Cherry L.C.J., and Madden J.), that the certiorari should be refused. *Per* Cherry L.C.J., on the ground that certiorari did not lie to quash an order of dismissal by justices. *Per* Madden J., on the ground that the magistrate had rightly decided that the field was an orchard.

Held, by the Court of Appeal, affirming the order of the King's Bench Division, that the certiorari should be refused, on the ground that the magistrate having heard the evidence and determined the question of fact that the field was not an orchard, there was no jurisdiction to review his determination.

The Queen v. *Dayman*, 7 E. & B. 672, applied and followed.

To justify the making of an order to enter land under s. 162 of the Grand Jury (Ireland) Act, 1836, the applicant must satisfy the justices that the land does not come within the class excepted by the section, viz., a deer-park, bleach-green, orchard, etc.

Reg. (Murphy) v. *Justices of Wexford*, [1894] 2 I. R. 81, approved of.

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(1) In the King's Bench Division, before Cherry L.C.J. and Madden J.

K. B. Div.
1915.

REX (DARCY)
v.
JUSTICES OF
CO. CARLOW

CERTIORARI.

This was an application on behalf of the prosecutor to make absolute, notwithstanding cause shown, a conditional order for a writ of certiorari to quash an order made by a justice at petty sessions on the 4th June, 1915, refusing an application by the prosecutor for an order under sect. 162 of the Grand Jury Act, 1836, to enter a certain field in the occupation of Dermot H. Doyne, and dig for and carry away road materials.

The following statement of the facts is taken from the affidavit of the prosecutor, filed for the purpose of obtaining the conditional order:—

On the 25th September, 1914, the prosecutor, a road contractor, and one Patrick Kavanagh, also a road contractor, had obtained orders from the justices authorizing them to enter a certain field, part of the lands of Tullowbeg, in the County of Carlow, then in the occupation of the said D. H. Doyne, and dig for and carry away materials for the repair of roads, for which the prosecutor and Patrick Kavanagh then held contracts. Doyne obtained a conditional order for a writ of certiorari to quash these orders, on the ground that the justices had no jurisdiction to prescribe a point of entrance upon the land specified in the orders. This conditional order was discharged by an order of the King's Bench Division, dated the 17th November, 1914. Doyne appealed from this order. The Court of Appeal, by an order dated the 21st January, 1915, affirmed the order of the King's Bench Division.

The field in question contained 24A. 1R. 16P., statute measure. Immediately after the order of the King's Bench Division Doyne planted thirty-six fruit-trees, which number he afterwards increased to sixty, some around the plots in the field in respect of which the prosecutor and Kavanagh had obtained the said orders to get materials, and some along the boundary fence separating Doyne's land from the public road, from which road convenient access could be had to that part of the field in respect of which the prosecutor and Kavanagh had obtained the above-mentioned orders. After the order of the Court of Appeal, Doyne erected a wire fence enclosing about 4A. 1R. 10P. of the field. The fruit-trees above referred to were within the portion so enclosed, but only occupied 3R. 30P. thereof.

The prosecutor was a contractor to the County Council of the County of Carlow for the repair of portion of a public road in the county for the period of one year, from the 31st March, 1915, to the 31st March, 1916.

Paragraphs 6 and 7 of the prosecutor's affidavit set out as follows:—

"6. On the 1st day of June, 1915, I caused to be issued a summons against Dermot H. Doyne . . . to obtain an order under sect. 162 of the 6 & 7 Wm. IV, c. 116, to enter part of the lands of Tullowbeg, in the county of Carlow, so enclosed by the wire fence hereinbefore referred to, for the purpose of getting gravel, stones, and sand for the repair of the said road. The said summons came on for hearing at the Tullow petty sessions on the 4th day of June, 1915, before Mr. J. C. Ryan, resident magistrate, when an order was made to the following effect:—'Application refused, without costs.' . . .

"7. On the hearing of the said summons the County Surveyor, Mr. J. P. Punch, and I proved that road material could not be conveniently procured elsewhere than on the lands of Tullowbeg aforesaid, the property of the defendant. The defendant swore that eighteen months before the summons in the last preceding paragraph hereof referred to, he conceived the idea of making an orchard at the *locus in quo*, but deferred doing so until after the orders of the 17th day of November, 1914, for entry to his lands of Tullowbeg aforesaid were made; that he then first planted about forty apple-trees, and some of them having been stolen or damaged, he supplemented them, making a total of about sixty. He admitted that his object in so doing was to prevent access to his lands by contractors, and that it was done on the advice of a friend. He also admitted, with regard to the erection of the wire fence round the 4a. 1r. 10p., that this was not erected until after the order of the Court of Appeal, bearing date the 21st day of January, 1915. He swore that it was his intention to plant the remainder of the 4a. 1r. 10p. with fruit-trees at the proper season. The resident magistrate held that upon the evidence of the defendant he bona fide intended to plant the whole of the said area of 4a. 1r. 10p. with fruit-trees, and held that it was an orchard, and dismissed the summons."

The prosecutor, in his affidavit, prayed for an order of certiorari to bring up the order made at petty sessions on the 4th June, 1915, for the purpose of quashing the same, and for a writ of mandamus compelling the said magistrate to adjudicate thereon according to law, on the ground that the said field was not an orchard, and that the defendant in planting it did not bona fide intend to create an orchard.

The conditional order was granted for the certiorari only, on the ground mentioned in the affidavit.

An affidavit was made by D. H. Doyne, for the purpose of showing cause against the conditional order. He admitted that the dates mentioned in the affidavit of the prosecutor were substantially correct, as well as the statement of his (Doyne's) evidence contained in paragraph seven. He stated, "The order which is sought to be quashed was made by the magistrate after a lengthened hearing, and he held as a matter of fact that the ground which I have fenced off was an orchard, and that I bona fide intended to plant with fruit-trees the part which has not yet been planted." He also stated that he intended to plant more fruit-trees on the land, which was in every way suitable for that purpose.

Battersby K.C., and *Lupton*, for the prosecutor.
Leech K.C., and *Charles Murphy*, for D. H. Doyne.

CHERRY L.C.J. :—

This is an application to make absolute a conditional order for a writ of certiorari to quash an order of justices under section 162 of the Grand Jury Act, refusing an application of the prosecutor for an order for liberty to enter the lands of Dermot H. Doyne for the purpose of raising and taking road materials therefrom. There has been a good deal of litigation between road contractors and Mr. Doyne, none of which has any materiality to the present inquiry. It appears that shortly before the hearing of the present application, and after a decision by the Court of Appeal in favour of the contractors, portion of this land was planted with apple-trees, and that that portion was fenced off from the remainder of the land. It is alleged by Mr. Doyne that this portion so separated from the rest of the land is an orchard.

When the case came before the petty sessions, evidence on the whole matter was gone into. The applicant proved by the county surveyor that road material could not be conveniently procured elsewhere. Apparently no preliminary point was raised, but after the applicant had given all his evidence, Mr. Doyne raised the point which ought to have been mentioned at the commencement of the proceedings, namely, that the lands were an orchard, and as such excluded by the section itself from the jurisdiction of the justices.

The magistrate refused the application, and it would appear, so far as we can judge, that the main ground of his decision was that the place was an orchard. The important point is that the order upon the book is of a general character and applicable to all the evidence. That order was, "Application refused, without costs." If we had no explanation by affidavit, we should suppose that such an order applied to a hearing upon the merits, and that no point of jurisdiction had been raised. But it appears that a question as to jurisdiction was raised, and adjudicated upon, and the order, as entered in the book, was intended to apply to the question of jurisdiction, which the magistrate decided against the applicant, as well as to the merits of the case.

Taking it that the order applied both to the preliminary point and to the evidence on the merits, we are asked to quash it on certiorari on the ground that it was made in excess of and without jurisdiction. How can it be said that it was in excess of jurisdiction to refuse the application on the ground that the lands were orchard? It has been held in this Court that in no case can certiorari issue to remove and quash an order of dismissal by justices: *The Queen* v. *The Justices of Antrim* (1). Three out of the four judges who heard the case came to that conclusion. Mr. Justice Holmes dissented, but only on the ground that there might be extreme or exceptional cases in which the Court ought to exercise its power and quash orders of dismissal. He appeared to agree with the other judges that, as a general rule, orders of this kind ought not to be quashed on certiorari. The judgment of the Lord Chief Justice, Sir Peter O'Brien, as he then was, is express on the point. He says at p. 635, "We are all of opinion that the conditional order cannot be sustained on any of the grounds advanced in support of it. One fatal objection presents itself *in limine.* The offence with which Love, the defendant in the summons, was charged is one punishable by fine and imprisonment, and the order sought to be quashed is one of acquittal. In the whole range of our law there is no precedent for the granting, or even the making, of such an application in a case where there has been an acquittal by the magistrates. Not only is the application unwarranted by precedent, but principle cannot be referred to in support of it; on the contrary, to grant this application for a writ of certiorari to quash the order for acquittal, and for a writ of mandamus to compel the magistrates to re-hear the complaint, would be to act in disregard of one of the most deep-rooted principles of the law. It would be a direct infringement of the principle that no one is to be tried twice for one and the same offence. *Nemo debet bis vexari pro una et eadem causa* is a maxim embodying one of the most cherished principles of our law. In reference to this, it is stated in Mr. Paley's excellent work on Summary Convictions, that this maxim is one of general application to civil and criminal proceedings, to actions, and to summary convictions and indictments." The proceedings there were of a quasi-criminal character, but the observations of the Lord Chief Justice apply to civil as well as criminal proceedings, and accordingly we must allow the cause shown, and discharge the conditional order.

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(1) [1895] 2 I. R. 603.

Madden J.:—

In this case the owner of considerable property, previous to an application that was made under sect. 162 of the Grand Jury Act, had enclosed four acres of land, and, at the time when the application was made, these four acres were, to a certain extent, planted with trees. I believe, upon the evidence, that this planting was bona fide, and really the commencement of the planting of the entire four acres as an orchard. The amount of ground is what might reasonably be appropriated for that purpose. It may be that the owner converted this portion of his estate into an orchard in order to exclude the application of sect. 162. With that question, however, we are not concerned. He is master of his own property, and if he prefers to devote it to the purpose of growing fruit-trees rather than to the purpose of providing material for the neighbouring roads, he is at perfect liberty to do so.

It is quite settled by authorities, following *Rex* v. *Bradford* (1), that the decision of the magistrates upon a point preliminary to the exercise of jurisdiction can be reviewed by this Court; and there are cases in which the orders of the magistrates founded upon the question of the existence of jurisdiction have been brought up upon certiorari. That is not the present case, and I wish to make it clear that my decision rests entirely upon my view of a question of fact, which I think was rightly decided, namely, that this place was an orchard. An argument has been addressed to us by Mr. Battersby and Mr. Lupton, about which I say a few words only for the purpose of making it clear that I express no opinion upon it. The order before us is simply: "Application refused without costs." It has been said that if you look at the affidavits they make it clear that the refusal of the application was based upon the decision that the place was an orchard, and that the decision being one upon a preliminary point is, according to *Rex* v. *Bradford* (1) and the Irish authorities, capable of being reviewed by this Court. I am far from adopting the view that the decision of magistrates on a preliminary point can be reviewed when given one way only—that it can be reviewed when the magistrates assume jurisdiction, and is incapable of being reviewed when the decision negatives jurisdiction.

It has been argued on the authority of *The Queen* v. *Bolton* (2) that it can be shown by affidavit that a preliminary question existed, and that this question was the ground of the magistrate's decision. As I have said already, I express no opinion as to whether it would be possible to interpret this order upon the facts as one refusing the application on the preliminary point, and then to deal with it on the authority of *Rex* v. *Bradford* (1).

I agree with the judgment of the Lord Chief Justice, that the cause shown should be allowed.

C. L.

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(1) [1908] 1 K. B. 365.

(2) Q. B. 66.

Appeal.
1916.
Rex (Darcy)
v.
Justices of
Co. Carlow.
April 5.

The prosecutor appealed (1).

Battersby K.C. (with him *Lupton*), for the appellant:—

It is submitted that the magistrate was wrong in holding that the place was an orchard, and that his decision can be reviewed by certiorari. Cherry L.C.J. held that certiorari did not lie in the case of an order of dismissal, relying on *The Queen* v. *Justices of Antrim* (2). That, however, was a criminal case in which the complaint had been dismissed on the merits; it has no application to a civil proceeding where the case is dismissed on a preliminary point. It is stated in Paley on Summary Convictions, 8th ed., p. 91, that upon an application for a mandamus or a rule calling on justices to hear and determine a matter brought before them, care must be taken to distinguish between those cases in which they have declined to enter upon the inquiry in consequence of a mistaken view of the law as to some preliminary point, and those in which, having entered upon the inquiry, they have actually arrived at a decision, however erroneous it may be. In the former instance, in which they are said to decline jurisdiction, the Court will compel them to proceed. In the present case, the question of orchard or no orchard is a preliminary one, and collateral to the main question, namely, that the road materials cannot be conveniently procured elsewhere, and in such case the Court may, on certiorari, consider not merely the evidence, but the weight of the evidence: *Rex* (*Roe*) v. *Justices of Roscommon* (3); *Rex* (*Burke*) v. *Justices of Galway* (4).

In *The Queen* v. *Brown* (5) a person was summoned before justices charged with an offence alleged to have been committed by him as the owner of a factory. He objected that as there were other owners they ought to be charged with him, and the justices upon this objection dismissed the complaint. The Queen's Bench granted a mandamus commanding the justices to hear and determine the information. Lord Campbell C.J. in his judgment

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(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ.

(2) [1895] 2 I. R. 603.

(3) [1905] 2 I. R. 101, 112.

(4) [1906] 2 I. R. 446.

(5) 7 E. & B. 757.

Appeal.
1916.
REX (DARCY)
v.
JUSTICES OF
CO. CARLOW.

says:—"The objection taken was a preliminary objection, that the proper parties were not before the Court. To uphold that objection is not to exercise jurisdiction, but to decline it." [Ronan L.J. referred to *The Queen* v. *Dayman* (1).] That case cannot be considered as an authority, having regard to the subsequent decision in *The Queen* v. *Brown* (2).

The conditional order here is for a writ of certiorari only. The prosecutor applied for a writ of mandamus as well, but was informed in the office that this was not necessary. If necessary, I would ask to add an application for a mandamus.

Leech K.C. and *Charles Murphy*, for the respondent, were not called on.

SIR IGNATIUS J. O'BRIEN L.C.:—

This is an appeal from an order of the King's Bench Division discharging a conditional order for a writ of certiorari to quash an order of a justice refusing an application of the prosecutor, a contractor to the County Council, for an order under sect. 162 of the Grand Jury Act, as adapted by the schedule to the Adaptation of Irish Enactments Order, 1899, to enter on certain lands for the purpose of obtaining road materials. The conditional order was for a writ of certiorari alone, and there seems to have been some confusion as to whether that should not have been followed by an order for a mandamus, but I do not think that anything turns on this. The order of the justice must be got rid of by certiorari before any further order in the nature of mandamus can be made, and if certiorari does not lie there is, in my view, an end of the case. Speaking for myself I do not think that the court should make any difficulty by reason of the conditional order not including an order for a mandamus, but it is unnecessary to consider this, as we are of opinion that the order of the King's Bench Division ought not to be disturbed.

I shall state shortly the ground on which I think that the appellant here must fail. The land in respect of which the order was sought was land which had been the subject of a previous application under the same section, and the justices had made an order authorizing the prosecutor to enter this land and take road materials. An application made to the King's Bench Division for a writ of certiorari to quash this order was refused, and the decision of the King's Bench Division was affirmed by this Court. It appears that, following the suggestion in *The King* (*De Vesci*) v. *Justices of Queen's County* (1) that the character of the land might be changed from non-exempt land under the section to exempt land, the owner proceeded, after the decision against him in the King's Bench Division, to plant fruit trees round the portion of the field from which the road material was to be removed, and that after the decision of the Court of Appeal he erected a wire fence round the portion planted.

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(1) 7 E. & B. 672.

(2) 7 E. & B. 757.

When the application with which we have to deal in the present appeal came before the justice—the resident magistrate—certain evidence was given by the contractor. (I put it in that vague way for the present, because it is necessary to consider what is the nature of the proof to be given on such an application.) Mr. Battersby contends that on the true construction of sect. 162 it was not necessary for the contractor to prove a negative—namely that the lands are not exempt by reason of being an orchard. He also contended that once there was raised before the justice what he called a preliminary question, that the lands were not an orchard although alleged to be so, the justice must consider the question of orchard or no orchard, and that this being a collateral question on which his jurisdiction depends, if he decides, as he has done in this case, that the land in respect of which the order is sought is an orchard, his decision is subject to review by the King's Bench Division upon this question of fact.

The first point to be remembered is that the Queen's Bench Division in the case of *Reg.* (*Murphy*) v. *Justices of Wexford* (2)—a decision which seems to me to be absolutely right—have considered the true construction of sect. 162 with regard to the form of order to be made which will legally justify a contractor in entering on lands—in other words, justify what but for the order would be a trespass. It was argued in that case that an order which did not show on its face that the lands were not of the character excepted by the section—viz., a deer park, bleach green, orchard, &c., was good, on the ground that the words used in the proviso at the end of the section are " any lands," not " any such lands," and mean lands generally, and that the limitation imposed by the words of the earlier part of the section, " not being a deer-park, bleach green, orchard," &c., was not to be read into the proviso at the end which authorizes the making of the order. The Queen's Bench Division, however, decided that that contention was not well founded, and that an order which did not show on its face that the lands were not of the excepted class was bad.

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(1) [1908] 2 I. R. 285.

(2) [1894] 2 I. R. 81.

Sir P. O'Brien L.C.J., in giving judgment, says :—" I do not think that there is anything in the proviso to give the word 'lands,' used therein, a wider—a more restricted—meaning than the word 'lands' in the body of the section." Holmes and Madden JJ. concurred in this view of the proviso.

Madden J. pointed out, and I entirely concur, that the opposite construction would lead to a result never contemplated by the Legislature, that on proof that the necessary materials could not be conveniently obtained elsewhere than in some orchard or garden, the magistrate would be bound to make an order authorizing the contractor to enter this orchard or garden, in direct contravention of the earlier part of the section.

I pointed out in the course of the argument in the present case that in construing a section of this kind, which undoubtedly imposes for the benefit of the community very serious obligations on owners of property, it would be an extreme thing to hold that, where the defendant did not appear, it would be sufficient for the contractor to prove that the materials could not conveniently be obtained elsewhere, and that this would justify an order without any evidence being given that the lands were not of the class excepted. I find that view confirmed by the decision in *Reg.* (*Murphy*) v. *Justices of Wexford* (1). Sitting in this Court we are not, of course, bound to follow that decision if we think it wrong. The decision, however, appears to me to be perfectly right, and accordingly I am of opinion that, not only must the order show on its face that the lands are not within the exception, but that

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(1) [1894] 2 I. R. 81.

Appeal. 1916.

REX (DARCY) *v.* JUSTICES OF CO. CARLOW.

Sir Ignatius J. O'Brien L.C.

before the justices make the order they must have before them evidence showing that the lands are not within the exception.

There is a class of case undoubtedly in which, in order to give jurisdiction, certain collateral conditions must exist; but, to my mind, this case does not come within that category. The justices have power to make an order enabling the contractor, against the will of the owner, to enter into lands not being of a certain class. Therefore, in order to make a valid order, the justices are bound to consider, not as a preliminary matter, but as of the substance of the case, whether the lands in respect of which the order is sought do or do not come within the exception, and the person applying for the order is bound to satisfy them that the lands do not come within the exception.

The case of *The Queen* v. *Dayman* (1) was referred to in the course of the argument, and Mr. Battersby had to admit that it was a difficult case for him to get out of unless he could show that it had ceased to be of authority. That case was a decision upon sect. 105 of the Metropolis Local Management Act (18 & 19 Vict. c. 120), which provides that in case a new street is not paved to the satisfaction of the vestry, the vestry may pave the same, and the owners of the houses forming such street shall, on demand, pay to the vestry the estimated expenses of such paving. Sect. 106 provides that the vestry may, by notice in writing put up in any part of any street in their parish "not being a highway," declare their intention of repairing the same under the Act, and thereupon the same shall be from time to time repaired by them under the authority of the Act. A summons having been issued against the proprietor of houses in a street alleged to be a "new street," for his share of the expenses of paving it, the magistrate, after hearing the parties and their evidence, dismissed the summons on the ground that the street was not a "new street" within the enactment, because it was an old highway. A rule had been obtained calling on the magistrate to hear and adjudicate on the complaint, and this rule was discharged by the Court of Queen's Bench.

Lord Campbell C.J., in giving judgment, says:—"This is an application to us to command a police magistrate to hear and adjudicate upon a complaint. It is resisted on the ground that he has already heard and adjudicated upon it; and I think this answer completely established." What has the magistrate done in the present case? He undoubtedly heard evidence on the question of whether or not this place was an orchard, and as to the gravel not being conveniently procurable elsewhere, and having heard that evidence he refused the application. It is not suggested, nor could it be, that his order is bad on its face, but it is sought to impeach the order on the ground that this question of orchard or not orchard was a collateral, independent, and preliminary consideration in which he has erred, and as to which the King's Bench Division can exercise some function as judges of fact. Lord Campbell C.J. goes on to say:—"Mr. Dayman, being a police magistrate in the Metropolitan District, has the same power as two ordinary justices. The summons is before him on a complaint that the expenses alleged to be due for paving what is said to be a new street within sect. 105 have not been paid. He was bound to hear and to adjudicate on this." In the present case I am of opinion that the magistrate was bound to hear and to adjudicate upon this question of orchard or not orchard. Lord Campbell then proceeds:—"I think he did so: the question was whether Dawson Place was or was not a new street; on that issue was joined. He heard the parties and the evidence, and gave a solemn judgment that it was not a new street. Could we, supposing we should think that he was wrong in so determining, make an order that he shall give an opposite judgment? I think that we cannot do so. We have no authority to do more than order him to hear and adjudicate . . . . Then, having no jurisdiction, we should give no opinion. We are not a court of advice, but of Oyer and Terminer; we sit here not to deliver opinions which out of respect to us might be generally followed, yet which might without impropriety be neglected, but to deliver judgments which may be enforced; we ought not to give an opinion except as a judgment." The application there was for a rule in the nature of a mandamus, but it is obvious that on an application such as this to quash the order on the ground of its having been a determination in a collateral matter, everything that Lord Campbell said is authority in favour of the contention of the respondent.

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(1) 7 E. & B. 672.

If the case is to be considered as an authority—and it has never been doubted—it is very close to the present case.

It has been suggested, however, that *The Queen* v. *Dayman* (1) is inconsistent with *The Queen* v. *Brown* (2) decided shortly afterwards, three of the judges, namely, Lord Campbell C.J., and Erle and Crompton JJ., being the same as those in the previous case. There was no forgetfulness of the former decision, because both Erle J. and Crompton J. refer to it; Erle J., who had dissented in *The Queen* v. *Dayman* (1), stating that he took the same view as he had expressed in that case. Crompton J. says: "If I agreed with my brother Erle that the question here is the same as that in *Regina* v. *Dayman* (1), I should decide for discharging this rule." Lord Campbell C.J. puts his judgment on the ground that the objection taken was a preliminary objection, and so indeed it would seem to be, because it was based upon the alleged absence of necessary parties. If it was necessary to distinguish the case from *The Queen* v. *Dayman* (1), it might be distinguished on this ground; but it seems to me to deal with a totally different class of case. I will not take on myself to decide that *The Queen* v. *Dayman* (1), which has been followed for so many years, is not good law. It appears to me to be perfectly good law.

The question then being one which, as Lord Campbell says, the magistrate was bound to hear and adjudicate upon, and not being a collateral matter, but part and parcel of the question to be determined in order to make an order, and the magistrate having heard and adjudicated upon it, it would be wrong for this Court to take on itself the function of a Court of Appeal to re-determine a question of fact the determination of which is vested by the section in the justice. I abstain from saying anything as to the correctness or otherwise of the decision at which the justice arrived, looking at it as a question of fact. It would be idle to say that I might myself have formed a different opinion. He has determined a question of fact, one within his jurisdiction and not a mere collateral question, and we have no jurisdiction to interfere with his determination.

(1) 7 E. & B. 672. (2) 7 E. & B. 757.

RONAN L.J.:—

In this case Madden J. approved of the decision of the magistrate that the place in question was an orchard, and I do not understand the Lord Chief Justice to have dissented from that view. I do not intend to express any view upon that question, as in my opinion we have no right, sitting as a Court of Appeal, to deal with it.

Section 162 of the Grand Jury Act is divided into two parts. The first part gives a general authority to the county surveyor or contractor to dig for, raise, and carry away road materials out of any lands, not being a deer-park, bleach-green, orchard, &c. This part of the section gives him no power to enter on the lands for this purpose. The latter part of the section provides that it shall not be lawful for such contractor or surveyor to enter any land for the above purpose against the will of the occupiers without the previous order of a justice of the peace, which order the justice is authorized and required to grant on its being proved to his satisfaction that the materials cannot be conveniently procured elsewhere. The earlier part of the section contains provisions as to naming householders for the purpose of assessing the damage, on the basis that the owner of the land is an assenting party. The second part provides as to what steps can be taken where he is not an assenting party. In the earlier part of the section no power is given except where the land is not a deer-park, bleach-green, orchard, &c., and it would in my view be absurd to hold that, where the owner objects, there is authority given by the second part of the section to enter on the land although it may be a deer-park, &c. This was the view taken by the Queen's Bench Division in *The Queen* (*Murphy*) v. *Justices of Wexford* (1).

In order to make the order the magistrate should be satisfied, first, that the lands are not within the excepted class, and then that the materials cannot be conveniently procured elsewhere. Both these matters are pure questions of fact. If the magistrate refuses the application, he is not bound to state on which of these grounds he refuses it. The order here is good on its face, there being no obligation on the magistrate to state the ground on which he refused the application, so I do not think that we have any jurisdiction to review his order.

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(1) [1894] 2 I. R. 81.

I agree with the Lord Chancellor that *The Queen* v. *Dayman* (1) is a direct authority.

Molony L.J.:—

I am of the same opinion, and have nothing to add to the judgment of the Lord Chancellor.

Solicitors for the prosecutor: *C. Thorp & Son.*

Solicitor for D. H. Doyne: *Edward C. Jameson.*

J. G. T.

In re STORY, Infants.

K. B. Div.
1916.
Jan. 17, 18.
Feb. 11

Infants — Custody — Father and Mother of different Religions — Habeas Corpus—Discretion of Court to refuse Custody to Father—Guardianship of Infants Act, 1886 (49 & 50 *Vict., c.* 27), *s.* 5.

S., who was a Roman Catholic, married in the year 1903 in a Protestant church a woman who was a Protestant. He promised at the time of the marriage to adopt his wife's religion. There were two children of the marriage, and S. allowed them to be baptized and brought up as Protestants. From the year 1909 the children had lived with their mother, and been supported and educated by her, S. contributing nothing to their support or education, and living, at first with his sister, and afterwards becoming an inmate of a workhouse. In December, 1915, the children being then aged about 11 and 8 respectively, S., being desirous that they should be brought up as Roman Catholics, demanded them from his wife, and this demand being refused, he applied for a writ of habeas corpus. He was at this time still an inmate of the workhouse, but had arranged for the children to be maintained and educated in Roman Catholic charitable institutions.

Held, that the writ of habeas corpus should not be granted.

Effect of s. 5 of Guardianship of Infants Act, 1886, considered.

Application to make absolute a conditional order for a writ of habeas corpus, directed to Ivy Isabella Story and Isabella Jay, to have before the King's Bench the bodies of Stuart Bernard Story and Maria Cathleen Story, infants.

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(1) 7 E. & B. 672.

Bernard Story, the father of the infants, had obtained a conditional order for the writ of habeas corpus upon an affidavit made by him, which set out as follows:—

I, Bernard Story, at present an inmate of Loughlinstown Union, in the County of Dublin, aged 21 years and upwards, make oath, and say as follows:—

"1. I was married to my present wife, Ivy Isabella Story, in Grangegorman Protestant church, on the 13th December, 1903, I being a Roman Catholic. There was issue of said marriage three children, two of whom now survive, namely, Stuart Bernard Story, born 2nd November, 1904, Maria Cathleen, born 2nd March, 1908. Both my children were baptized in the Protestant church, Grangegorman. Up to July, 1909, I was a grocer's assistant in the Junior Army and Navy Stores. In that month I got ill, and was obliged to go to hospital, and was discharged from hospital in or about April or May, 1910. During my illness in hospital my wife and my two children went to reside with my mother-in-law, Isabella Jay, at 47 De Courcey Square, Glasnevin.

"2. On my discharge from hospital I went to reside, during my convalescence, with my sister in Kingstown, as my mother-in-law would not permit me to reside with my wife at her residence. My wife refused to reside with me at 3 Northumberland Avenue, Kingstown; nor would she permit my two children to reside with me, or allow me to visit them.

"3. On the 10th October, 1910, my solicitors wrote to my wife demanding the custody of my two children, and I called in pursuance of said letter at my wife's residence, on Wednesday, the 12th day of October, 1910, for the purpose of taking my children with me. I did not see my wife; but my mother-in-law opened the door, and refused to allow me to see my children, or to give me the custody of said children. Subsequently, my sister raised some objections to having my children reside with her at 3 Northumberland Avenue, Kingstown, and not having any place to bring them, owing to their tender years, I allowed the matter to remain over until they were older. Owing to want of employment and delicate state of health, I was compelled in April, 1913, to become an inmate of Loughlinstown Union. In

August, 1913, I arranged with the Very Rev. Canon Murphy, P.P., Kingstown, to have my children placed in Catholic institutions, as I wished them to become Catholics, and be brought up in my religion. Accordingly I again applied, through my solicitors, for the custody of my said two children, and I beg to refer to a letter written by them to my wife, on the 1st August, 1913, upon which, marked 'A,' I have endorsed my name prior to swearing hereof. I say that said letter was returned to my said solicitors, the envelope being marked 'opened by mistake, Mrs. Strahan, 40 De Courcey Square, not for her,' and also having the words, 'not known at address, J. Mc. G.' I believe the latter words and initials are the postman's. I beg to refer to said envelope containing said letter, upon which, marked with the letter 'B,' I have endorsed my name prior to swearing this affidavit.

"4. I was unable to find any trace of my wife or children until July, 1914, when my wife visited me at Loughlinstown Union and informed me that she was residing at 13 Home Farm Road, Drumcondra, but she would not bring the children to see me, and I understood from her they were still being brought up in the Protestant religion, and going to Mountjoy School. I subsequently arranged with the Very Rev. Canon Murphy to again try and get them into Catholic institutions, but my wife called on me about a fortnight ago, when she informed me she had no intention of giving over the custody of the children to Canon Murphy for the purpose of placing them in Catholic institutions, or having them brought up in the Catholic religion. I, on this, the 20th day of December, 1915, accompanied by my solicitor, and the Very Rev. Canon Murphy, and Mr. J. J. Kennedy, attended at 13 Home Farm Road, Drumcondra, for the purpose of getting the custody of my children. At the hall-door we met my mother-in-law, Mrs. Jay, and my wife, from whom I demanded my children, but they both subsequently refused to let me have the custody of them, nor could I get the children produced. It is my wish and desire that my children should be baptized as Roman Catholics, and that they should be placed in Catholic institutions, to be brought up as Roman Catholics. The Very Rev. Canon Murphy has arranged to have them placed in such institutions, where they will be maintained and educated, and I pray this honourable Court for a writ of habeas corpus, ad subjiciendum, directed to Ivy Isabella Story and Isabella Jay to give up to me the custody of my said children."

An affidavit made by Mrs. Ivy Isabella Story, the mother of the infants, and filed by way of cause against the conditional order, set out as follows :—

"1. That I am of the Protestant religion and was married to the said Bernard Story on the 12th December, 1903, in the Protestant Church of All Saints, Grangegorman, Phibsborough, in the city of Dublin, and there were three children of the marriage, two of whom, a son named Stuart Bernard Story, aged eleven years and two months, and a daughter named Maria Kathleen Story, aged seven years and ten months, are living.

"2. That at the time I was married to the said Bernard Story the said Bernard Story was nominally a Roman Catholic, but he promised that he would be whatever I was if I married him, or I would not have married him. On the faith of the said promise the marriage took place, and until we made a home for ourselves we went to reside with my mother at Albemarle Terrace, Phibsborough, and subsequently at 4 St. Joseph's Villas, and at 47 De Courcey Square, Glasnevin, in the city of Dublin.

"3. That my said children were baptized by the Rev. Joseph Bewley, M.A., the curate of All Saints, Grangegorman, aforesaid, in the Protestant religion, and my said husband himself arranged with the said Rev. Joseph Bewley for the baptism of my said children and consented to their being baptized in the Protestant religion, and was present at each baptism in All Saints' Church aforesaid.

"4. That a few years after my marriage to the said Bernard Story I noticed that he had become addicted to drink, and eventually my mother was obliged to put him out of her house owing to his filthy and offensive habits, the least of which perhaps was his heavy and excessive drinking of intoxicating liquors. I thereupon accompanied my said husband and we went to live at Addison Place, Botanic Avenue, Glasnevin, together with my said children.

"5. That in the month of July, 1909, owing to the said excessive drinking of intoxicating liquors, the said Bernard Story dropped down in Botanic Avenue, Glasnevin, and the city ambulance brought him to the North Dublin Union, where they put him in the ward reserved for people of unsound mind, as he was suffering from delirium tremens.

"6. That in the month of October, 1909, I took him out of North Dublin Union, thinking that a change might do him good, and brought him to his sister's residence at 3 Northumberland Avenue, Kingstown. On leaving him there I asked him what was to become of the little children; he said that they would not get in there (meaning his sister's residence), and told me I might take them where I liked.

"7. That following on the events deposed to in paragraphs 5 and 6 hereof, I returned to my mother's residence with the said children, and since the 14th August, 1910, I have been employed as a ledger clerk in the offices of one of the principal provision merchants in the city of Dublin, and have since that time clothed, maintained, and educated my said children out of my earnings in the said employment as ledger clerk, together with such assistance as my mother has been able to give me, and at the present time my said children are being educated in the National School at Drumcondra.

"8. That in the month of October, 1910, as I am informed and believe, the said Bernard Story and his sister brought two policemen to my mother's residence and demanded the said children, and after that I heard nothing of my said husband until the month of April, 1913, when I learned that he was in the Union at Loughlinstown, where I went to see him, and have since occasionally telephoned to know how he was.

"9. That I have during all their life attended to the religious instruction of my said children, teaching them in the Protestant faith, in which teaching the said Stuart Bernard Story has now fixed and definite belief, and I verily believe it would be dangerous and injurious to the spiritual welfare of my said children that they should be again baptized into another religion and instructed in a different faith.

"10. That the said Bernard Story since the month of July, 1909, has not contributed anything towards the support, maintenance, and education of his said children; and I respectfully submit that he has been wholly unmindful of his parental obligations, and that he is not a fit person to have the custody or control of the said children, having regard to their interests, and I pray this honourable Court that my said children may be left in my custody and control where they have, for the past six years and upwards found a comfortable and happy home, being educated according to their station in life, and well cared for in the loving attention of their grandmother and me, this deponent their mother, to be parted from whom would break their hearts."

Bernard Story, in an affidavit in reply, denied that his illness in July, 1909, was due to intemperance, or that he was a habitual drunkard.

The Very Rev. Canon Murphy, Parish Priest of St. Michael's, Kingstown, County Dublin, made an affidavit in which he stated that he had arranged with Bernard Story that, in the event of his recovering the custody of the children, they should be maintained and educated in the following places: Stuart Bernard Story, at St. Vincent's Orphanage; and Maria Cathleen Story, at the Sacred Heart Home, Drumcondra.

M'Gonigal K.C. (with him, *George Moonan*), for the applicant, the father of the infants:—

The father of a child has a right to have it brought up in his religion, unless he has forfeited that right by some moral misconduct, or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of the child: *In re Agar-Ellis* (1); *In re Agar-Ellis* (2). So long as the religious opinions of the child have not become fixed, so that it would be detrimental to the welfare of the child to interfere with them, the father is entitled to change the religion of his child: *In re Scanlan* (3). The father's right to control the religion of his child is strongly laid down in *In re Grey* (4). In this case there is nothing in the character or conduct of the father to deprive him of the right to control the religion of his children. Mere intemperance will not deprive him of the right: *In re Goldsworthy* (5). For the purpose of enforcing his right he is entitled to the custody of his children.

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(1) 10 C. D. 49.
(2) 24 C. D. 317.
(3) 40 Ch. D. 200.
(4) [1902] 2 I. R. 684.
(5) 2 Q. B. D. 75.

K. B. Div. 1916.

In re STORY.

Leech K.C., and *A. V. Matheson,* for the respondents:—

The primary matter which a Court has to consider in a case like this is the welfare of the infants—physically, socially, and religiously. This is not a bona fide application, inasmuch as for years the applicant has shown no paternal affection for the children. A great change in the law has been made by the Guardianship of Infants Act (49 & 50 Vict. c. 27), by sect. 5 of which the welfare of the children, the conduct of the parents, and the wishes of the mother, as well as of the father, have to be taken into account. See also *In re A and B* (1), and the Custody of Children Act, 1891 (54 Vict. c. 3), ss. 1, 2, 3, and 4.

Where a child has been allowed to be brought up in a particular religion for a certain time, the Court will not interfere: *Meades, Minors* (2); *In re O'Malleys, Minors* (3); *Hill* v. *Hill* (4); *In re Newton* (5); *In re O'Hara* (6); *In re M'Grath, Infants* (7); *In re Grey, Infants* (8).

George Moonan, in reply:—

The two grounds in support of the application are (*a*) the natural right of the father to the custody of the children; (*b*) his legal right to dictate the religion in which children of tender years are to be brought up. [He referred to *In re Scanlan* (9); *In re Newton* (5).]

Cur. adv. vult.

Feb. 11.

CHERRY L.C.J.:—

This is an application on behalf of Bernard Story, the father of the two children named in the title hereof, to make absolute a conditional order for a writ of habeas corpus to deliver into his custody the two children, who are now and have been since their births residing with their mother. The affidavits disclose a sad story of married life. The parties were married in 1903, the husband being at that time a grocer's assistant in the Junior Army and Navy Stores. In religion he was a Roman Catholic, and his wife a Protestant. But at the time of the marriage he signified his intention of adopting her religion, and he allowed all the children, of whom there were three, to be baptized as Protestants. He was present at their baptisms and, on one occasion at least, he actually made arrangements himself for the performance of the ceremony in All Saints' Church, Grangegorman. He has since changed his mind, and now desires that the children should be brought up as Roman Catholics. The object of the present application, it is admitted, is to carry out this desire, and as the eldest child is only 11 years of age, and the youngest only 7, it is unlikely that they have formed any settled conviction on religious subjects, so that there would be no objection on this ground to a change in their religious instruction.

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(1) [1897] 1 Ch. 786.

(2) I. R. 5 Eq. 98.

(3) 8 Ir. Ch. 291.

(4) 31 L. J. Ch. 505.

(5) [1896] 1 Ch. 740.

(6) [1900] 2 I. R. 232.

(7) [1893] 1 Ch. 143.

(8) [1902] 2 I. R. 684.

(9) 40 Ch. Div. 200.

For some years after the marriage the husband and wife resided with her mother, Mrs. Jay, who is a party to these proceedings, until, as charged by the wife in her affidavit, her mother was obliged to put her husband out of the house, "owing to his filthy and offensive habits, the least of which perhaps was his heavy and excessive drinking of intoxicating liquors." The applicant and his wife then went to live at a house in Addison Place, Glasnevin, and continued there with their children until the year 1909. In July of that year the applicant was taken ill in the street, and was brought by the ambulance to the North Dublin Union, where he remained until the month of October, suffering, as his wife alleges, from delerium tremens. He then left the hospital, and went to reside with his sister at 3 Northumberland Avenue, Kingstown. "On leaving him there," his wife says, "I asked him what was to become of the little children." He said "they would not get in there (meaning his sister's residence), and told me I might take them where I liked." She brought them to her mother's house, where she has maintained and supported them ever since out of her earnings as a ledger clerk in a business establishment in the city.

Since the year 1909 the father has not contributed one penny to the support of the children, nor has he had a house, or even a room, in which he could give them shelter. Since the month of April, 1913, he has been an inmate of the Loughlinstown workhouse and is, I understand, still there. Were we to make the order which he asks us to make, he would not be able to provide his children with a single meal, or with a bed to lie on to-night. He meets this difficulty by saying that he has made arrangements with the managers of two charitable homes (one an orphanage) to take the children in and support them by public charity.

The law, of course, must be carried out by us loyally, whatever it is; but, speaking for myself, I have no hesitation in saying that unless I am constrained by authority to do so I will not make an order such as is asked for here. To take a little girl of seven years of age from her mother's care, and from the security and affection of her brother, all of which she has enjoyed since the day of her birth; to treat her as an orphan (which she is not), and send her, alone, to a public institution, no matter how well managed it may be, would be, in my opinion, an outrage on nature itself. If I can possibly avoid making an order having this effect, I shall certainly do so.

But, it is argued, the father's rights are paramount. Formerly, no doubt, this was the rule. "At common law," says Chitty J. in *In re A and B* (1) (p. 787), "the rights of a father to the guardianship and custody of his children were absolute." By modern legislation, however, the rights of the mother as to the custody of her children have been greatly extended. The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), has very much extended the mother's rights, and in a corresponding degree of course limited the father's rights, as regards the custody of their infant children. The 5th sect. of that Act provides in most general terms that the Court may, on the application of the mother of any infant, make such order as it thinks fit regarding the custody of such infant, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father.

Speaking of the general effect of this Act, Lindley L.J., in the case I have mentioned—*In re A and B* (1) (p. 790)—says:—"Nobody can read the various sections in the Act without seeing that it is essentially a mothers' Act. It has very greatly extended the rights of mothers. I do not say that it has much, if at all, diminished the rights of fathers, except as regards mothers; but to say that sect. 5 is to have no operation unless the father has so conducted himself towards his children as to justify the Court in depriving him of his children, is to reduce the section to a nullity; the section might as well be out altogether. What was the section put in for? What did the Legislature want to accomplish? The section was considered necessary, and was inserted because Talfourd's Act and the Act of 1873, as construed by the Courts, had not gone far enough in favour of the mother. It was to increase her rights, regard being had, of course, to the interest of the children."

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(1) [1897] 1 Ch. 786.

Having regard, therefore, to the powers conferred upon the Court by this Act, I am clearly of opinion that the Court should, in the present case, refuse to make an order depriving the mother of the custody of her children. Even if it were not a question of a mother's rights, I should be prepared to hold, on the evidence in the present case, that the applicant has, in the words of the Custody of Children Act, 1891 (54 Vict. c. 3), sect. 1, "so conducted himself that the Court should refuse to enforce his right to the custody of his children." It is not, necessary, however, to go so far as this. It is sufficient to base our decision, which I do, on the wide discretionary powers conferred upon the Court, even in cases where there has been no misconduct on the part of either parent.

We were not asked to make any order as to the religious instruction of the children, counsel for the applicant recognizing how futile it would be to attempt to compel the mother to instruct the children in any other religion than that in which she herself believes, and in which they have, with the father's express consent, been baptized.

The conditional order for a writ of habeas corpus should, therefore, in my opinion, be-discharged.

GIBSON J.:—

I agree. It is unnecessary to recapitulate the facts. The evidence to support the application is meagre and unsatisfactory. The family life was broken up by Story's misconduct; he has earned nothing for years, and is now a resident in the workhouse without any prospect of leaving it. The incident of October, 1910, when, accompanied by police, he suddenly appeared at Mrs. Jay's house, in his wife's absence at business, and demanded the children, aged about 6 and 3 respectively, conveys a painful impression. He had no home or means of support. His act displayed a heartless disregard of his children's interest, and of his wife's feelings. Was his conduct prompted by desire to revenge himself for exclusion from family life, or to get bought off by his wife (who had shortly before begun to earn something), or, by threat of taking away the children, to coerce her to receive him back—which species of pressure it was an object of the statutes as to mothers and infants to prevent: *Warde* v. *Warde* (1).

Mr. McGonigal in his opening statement did not refer to any statutes as to the guardianship and custody, though they revolutionized the previous law on the subject: *X* v. *Y* (2), *A and B* (3). He relied entirely on decisions such as the *Agar-Ellis Cases* (4), (where family life continued, and the means of the father enabled a course to be taken entirely out of the power of lowly parents); *Re Goldsworthy* (5), and *Re Grey, Minors* (6); the two former before the Act of 1886, c. 27. Caution is necessary in applying authorities. So far as they state principles they bind, but in reference to the question of fact, what is for the welfare of the particular children before the Court, they cannot control the discretionary judgment which the Court has to pronounce on similar but not identical facts. And cases before the statute of 1886, c. 27, described as a mothers' Act, do not govern where that statute introduces considerations which might have affected the earlier decisions.

There is no reported case like this. A father cannot, save by a separation deed under the Act of 1873, c. 12, sec. 2, divest himself by contract, before or after marriage, of his paternal obligations and rights. By marrying as he did, Story acted in defiance of the authority and discipline of his Church, which declares such marriage, without a priest in Roman Catholic Orders, to be null

(1) 2 Ph., at pp. 787, 788.
(2) [1899] 1 Ch. 526.
(3) [1897] 1 Ch. 786, at p. 790.
(4) 10 Ch. D. 49; 24 Ch. D. 317.
(5) 2 Q. B. D. 75.
(6) [1902] 2 I. R. 684.

and void, with the painful consequences discussed in *Ussher* v. *Ussher* (1). Parted from his wife for many years, and the separation being now permanent, as his first display of active paternal interest he seeks, as member of the Church which by his marriage and the baptism of his children he professed to abandon, to deprive his wife of her offspring, the only comfort for her disappointed hopes of happy matrimonial union, making her heart and home desolate; and to sever his boy and girl from the only parent they have known and loved, leaving them motherless as well as fatherless, orphans indeed, to be put into orphanages where, divided from one another, they will be received as little derelicts, with the bitter thought that the terrible transformation has been wrought by their unknown father on the ground that their mother's faith renders her unfit to keep them in her home, and that their sudden introduction into their new surroundings may be accompanied by reflection from their associates on their mother and on their birth.

Counsel for Story confines the application to custody only, admitting that the rank and position in life of the parties would make it impossible to preserve the religion of the father by any special form of order, which, while the children remain with their mother, would be, as they concede, futile (*Houston's Case*, not reported, the judgments in which are noted in Mr. De Versan's Court Book, C. A., 19th April, 1900) as well as injurious to the children, and cruel, for reasons forcibly expressed in *Condon* v. *Vollum* (2) by Chitty J.—a case where the parents were separated by deed.

I will first briefly discuss the principles which must govern our decision, then refer to the relevant statutes, and in conclusion enumerate the various reasons for rejecting the application.

The paramount duty of the Court, acting as a wise, affectionate, and careful parent, *R.* v. *Gyngall* (3), is to decide what is best for the welfare of the children in its widest sense: *In re M'Grath* (4). A child's well-being is composed of many elements which relate to soul and body; moral training and character insensibly influenced under the discipline of those it trusts and loves. Nor is its happiness to be disregarded, and its right to enjoy the sunshine of home. Religion is an important factor, but it may be that the father's religion must give way to the interest of the child. "If the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to": Turner L.J., in *Stourton* v. *Stourton* (1), quoted with approval in *In re W.* (2); so in *In re M'Grath* (3). In *In re O'Hara* (4) FitzGibbon L.J. lays down the same principle.

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(1) [1912] 2 I. R., at p. 524.
(2) 57 L. T. 154.
(3) [1893] 2 Q. B., at pp. 241–243.
(4) [1893] 1 Ch., at pp. 148, 149.

The proposition in the *Agar-Ellis Cases* (5), that the father is by the law of nature made judge of what is for the welfare of his child, and not the Court, may not be reconcilable with previous decisions, e.g., *De Manneville* v. *De Manneville* (6), *Lyons* v. *Blenkin* (7), and other cases. Assuming, however, the proposition to have been at the time correct, considered as a rule controlling judicial discretion, it is displaced (save as regards religion) by the Act of 1886, c. 27, sec. 5, which, where the parents, now given equal rights, disagree, makes the Court supreme arbiter.

Religion—a matter as to which a lay Court must be neutral, each of the various lawful creeds having equal rights—is normally determined by the wishes of the father, whether he be alive or dead. Where he has expressed no wish, the law presumes a wish in favour of the faith that in his lifetime he professed. Where the father is dead, what his wish may have been may be the subject of controversy: *In re Walsh* (8). Where he is alive he speaks for himself, and there can be no doubt. This is the main difference between a dead and a living parent. Another is that the Court must recognize the claim of a living father to his child's society and love, an element which does not here exist. On the other hand, the conduct of a living father may be such that the Court would refuse him the custody of his child, though, if he were dead, there might be no objection to giving effect to his wishes as to guardianship. Subject to these distinctions, I do not think that a living father occupies a preferential position to a dead father.

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(1) 8 D. M. & G., at p. 771.
(2) [1907] 2 Ch., at p. 566.
(3) [1893] 1 Ch., at pp. 146-149.
(4) [1900] 2 I. R., at p. 240.
(5) 10 Ch. D. 49; 24 Ch. D. 317.
(6) 10 Ves. 52.
(7) Jac. 245.
(8) 13 L. R. Ir. 269.

Normally the Court must act on the wishes, when ascertained, of both. The Court, indeed, may be under a peculiar obligation of a fiduciary character to a dead parent that his rights should be maintained and not betrayed.

The paternal right may be lost in many ways which I do not propose to define. Those supposed here to apply are two—(1) the father's conduct, and the upbringing of the children by their mother in her own faith, at first with Story's express sanction, and afterwards without active interference on his part; (2) the elder child may have imbibed religious impressions which it would be dangerous to disturb.

A father's right may be lost by something occurring whether with or without his consent. *In re W.* (1) is an example of the latter class. In regard to conduct, the father may have, so to speak, forisfamiliated his child, planting it out, and allowed it to take root in another home, and in conditions which it would be unkind and injurious to the child's welfare, happiness, and prospects afterwards to alter; or, without quitting its home, the child may have been brought up in such a way that it would be against its welfare to make a change. *Hill* v. *Hill* (2) is of the latter type; *Andrews* v. *Salt* (3) is of the former class. The decision would have been the same if the father had been alive; see p. 639. *Lyons* v. *Blenkin* (4) is on the same lines. The father was a Unitarian, a religion fundamentally different from that of his Baptist children. See also *In re Newton* (5). A striking instance of the unwillingness of the Court to disturb an existing state of common family life and affection in a home of the parents' own selection is supplied by *Rex* v. *Walker* (6). The parents of an illegitimate child gave him to respectable people, who adopted him, and called him by their name, and loved him as their own. The parents, after many years, having married meantime, applied for habeas corpus. The application was refused by Hamilton J., who was affirmed by the King's Bench. On appeal (7), by consent, the custody was left undisturbed, but

(1) [1907] 2 Ch. 557.
(2) 10 W. R. 400.
(3) L. R. 8 Ch. 622.
(4) Jac. 245.
(5) [1896] 1 Ch. 740, at p. 752.
(6) 28 T. L. R. 342.
(7) 28 T. L. R., p. 375.

special right of application as to education, &c., was given. The decision, which does not relate to religion, was not founded on the illegitimacy of the child. It was based on the boy having become member of another family, from whom it would not be for his welfare to take him.

This question of religion imposes on the Court a peculiar and difficult function. In all the other matters relevant to the infant's well-being, it exercises its paternal duty on principles accepted by all, irrespective of creed. But in religion, into the merits of each variety of which, if lawful, it abstains from inquiring, it has only one guide, the actual or presumed wishes of the father, if such right has not been lost by conduct or circumstances. There are several denominations which enjoy statutory recognition. The Roman Catholic is separated considerably from the Church of Ireland; the latter one from the Protestant Dissenters accepting the Creed; all these Trinitarian churches are fundamentally divided from Unitarians; and Jews are not Christians at all. A father of any of these religious beliefs may exercise his paternal rights, and if he become a convert may take his children with him, thus causing painful domestic controversy. There are instances of Christians adopting Judaism, and even the creed of Islam.

It is not now necessary to express any opinion on the subject, but it may be that where wedlock is legally effected in the United Kingdom (*Chetti* v. *Chetti* (1)), the religion of the father may carry with it the paternal right (particularly in Ireland, where there is no State Church): *Re Besant* (2); *Attorney-General* v. *Becher* (3); *Re Ullee* (4), cited in Lord Halsbury's work. The opinion of FitzGibbon L.J., in *O'Hanlon* v. *Logue* (5), if correct, would seem a strong authority on the point.

Hence the importance of caution in applying the rule that the paternal religion is to prevail—a right described as sacred, not because the religion is true, but because, by natural law, the father must decide what is best for the spiritual welfare of his offspring here and hereafter: *Wellesley* v. *Wellesley* (1); *Re Besant* (2). The Court is not at liberty to consider what religion is best for the infant; it can only decide as to its well-being, as a whole, acting as a judicious parent, without bias. If the interest of the child, so considered, is incompatible with the exercise of the paternal right, the former must prevail. The rule that the choice is given to the father—the bread-winner and head of the family—and not to the mother, is the only practicable rule where the parents are of different faith; and it should be steadily applied in every case where it is not ousted by what the Court thinks is for the general welfare of the infant. The case of *Re Grey* (3) was one where special facts, which do not here exist, displaced the mother's right to custody, and the normal rule was held to apply.

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(1) [1909] P. 67.
(2) 11 Ch. D., at p. 520.
(3) [1910] 2 I. R., at pp. 265-266.
(4) 54 L. T. 286.
(5) [1906] 1 I. R., at p. 279.

I now turn to the statutes. Sect. 1 of the Act of 1873, c. 12, repealing Talfourd's Act, gave extended right to the mother, and was replaced by the Act of 1886, c. 27. It was formally repealed in 1893. Sect 2, still in force, declared that a separation deed was not to be invalid only by reason of giving up custody or control of the infant to the mother. In *Condon* v. *Vollum* (4), cited in Simpson on Infants, at p. 138, Chitty J. held that "control" implied authority over religion. Whether this decision be right or wrong, I think that a separation deed, giving the mother sole control, if silent as to religion, would make it impossible, unless for good reason the Court saw fit to intervene, for the male parent to insist on his paternal right without injury to the child's welfare. Such interference would, Chitty J. thought, be cruel, injurious, and futile. In the present case Story has been *de facto* separated from his wife for years. Such separation must now be permanent. The Act of 1873 recognizing the legitimacy of contractual separation, the Court may, to some extent, apply the same principle to such a case as the present, where the spouses no longer live together.

The Act of 1886, c. 27, sect. 5, prescribed the duty of the Court; where the parents' wishes are in conflict, discretion is governed by the welfare of the children, conduct of the parents, and the wishes of the mother as well as the father. The parents are placed on the same level. Conduct refers to marital duty, including duty to children, who are entitled to enjoy the care of both their parents: *Warde* v. *Warde* (1). The revolutionary change in the right of parents effected by this enactment is illustrated by *X* v. *Y* (2). The Act does not interfere with the existing paternal right as to religion.

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(1) 2 Bligh N. S., at p. 128.
(2) 11 Ch. D., at p. 520.
(3) [1902] 2 I. R. 684.
(4) 57 L. T. 154.

The Custody Act of 1891, c. 3, dealing with habeas corpus, is primarily, if not altogether, directed to persons having custody of children, other than parents whose rights *inter se* are described and fully protected by the Act of 1886, c. 27. Sect. 3 prohibits the delivery of a child to a parent unmindful of parental duties, unless the Court is satisfied that it is for the welfare of the child. Sect. 4 directs that where custody ought not to be given, the Court is empowered to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has the legal right to require the child to be brought up. "Parent" here includes "mother" as well as "father," though the gender is masculine. A child may belong to its mother's faith, and the mother may be entitled to have that faith safeguarded. What was chiefly contemplated was probably children placed in institutions or with charitable persons, of which there were many recent examples. The final provision (which applies to all the Act) as to consulting the wishes of the child, without any limit of age being mentioned, recognizes the existing practice of the Court. The word "wishes" is the same term as in sect. 5 of the Act of 1886: see *R.* v. *Gyngall* (3). The child must be capable of forming an intelligent real wish. The subject of the wish, whatever kind, religious or otherwise, is not specified. The last provision of the section, as to the child's right (not wish) to free choice, probably refers to the right of election now enjoyed by children of a certain age (not limited to sixteen). See *Ex parte Hopkins* (4); *R.* v. *Gyngall* (5).

No particular age is prescribed for "wishes." Children vary in precocity and intellect. Once a child might have been a

(1) 2 Ph., at p. 789.
(2) [1899] 1 Ch. 526.
(3) [1893] 2 Q. B., at p. 245.
(4) 3 P. Wms. 155.
(5) [1893] 2 Q. B., at p. 251.

criminal at seven. It is impossible to lay down an inelastic rule, but I do not know of any example of the Court seeing a child to assist its determination where the child was under nine.

The only legislation expressly dealing with mixed marriages that I have found is the Children's Act, 1908, c. 67, sect. 133, sub-s. 8. Where a child of such marriage is sent to a certified school it is deemed to belong to the religious persuasion in which he appears to have been baptized, or, that not appearing, to which he professes to belong. The enactment derogates from the previous paternal right, and attaches conclusive effect to baptism as an overt act fixing the religion of the child. It indicates the trend of opinion and developing policy of the law. This movement of opinion, and new conditions of society, must not be disregarded in forming what is a discretionary judgment: *Smart* v. *Smart* (1).

The last relevant statute that I notice is the Married Women's Property Act, 1882, c. 75, sects. 20 and 21. Mrs. Story, if she had sufficient separate property (her earnings were separate property), was bound to contribute to her husband's maintenance in the union, and support of her children. Prima facie the latter obligation when performed implies a right to custody: *Barnardo* v. *M'Hugh* (2), *per* Lord Herschell and Lord Field.

The grounds on which I must hold that this application for habeas corpus should be refused are as follows:—

Story has no means; no home; his object is not to gratify paternal affection, to promote the children's general interest and happiness, but only to enforce his religion.

He has been unmindful of marital and paternal duty, and is not only unfit, but unable, to supervise or control their training. He has been separated by his own fault from his wife and children for years, and has never shown any solicitude for their welfare.

By his marriage, their baptism, and permitting them to remain in the sole custody, control, and religion of their mother, he has created such a situation that the exercise of the right he now claims would be prejudicial to their welfare as a whole, considered in its moral, filial, and religious aspects, as well as their character and happiness, possibly also health and material outlook for the

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(1) [1892] A. C., at p. 436.

(2) [1891] A. C., at p. 388.

the future, deprived, as they would be, of the only parent to whom, and to whose connexions, they have to look for aid and encouragement when they grow up.

The separation between children living together from their birth would completely put an end to any semblance of family ties, and is always, where possible, to be avoided: *Warde* v. *Warde* (1); *Re Newton* (2).

The substitution of charitable institutions for a loving home is undesirable. The class of young people for whose benefit the institutions are designed, how long the children would be kept, what provisions would be made (if any) for them when leaving, whether there is any binding contract with the orphanages, whether they could could send away the children if they proved not receptive of their new teaching, whether the father could interfere or take them away, are matters not cleared up. In their novel surroundings, the children, made artificial orphans by the order of the Court, would be in a distressing atmosphere from the strange circumstances attending their introduction as inmates, and possibly they might be the object from their companions of painful reflections, all likely to have a disastrous effect on their character, moral nature, and human feelings of family affection and duty. It is plainly the mother who ought to have the custody and care of her children: *Re Clarke* (3); *Re O'Hara* (4).

Story says nothing to indicate when he repented of his religious backsliding, or when he resumed the practice of his creed. His conduct in 1910, having regard to the children's tender age and the circumstances, at a time when it is not alleged he was influenced by any religious motive, points to a desire to punish or coerce his wife in the way already described. The bona fides and sincerity of his present new-born zeal for a church which, by his marriage followed by the public baptism of his children, he seemingly abandoned, might be questioned; but in a matter relating to the inscrutable workings of human conscience, I abstain from any opinion.

It is stated that the boy, 11 years of age, has acquired distinctively Protestant convictions. If so, he ought not to be separated from his sister: *Re Newton* (1). What is said may be true; much depends on the intelligence and spiritual instincts of the individual child; and without mastering the details of the doctrinal controversy which divides the churches, he may have imbibed enough from his mother, his prayers and catechism, to make it painful and dangerous to force upon him instruction on the basis that hitherto his life had been spent, under his mother's teaching, in dangerous error. The violent and sudden change in his life would tend to make him ill-disposed probably to his father's creed, the cause of that change.

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(1) 2 Ph. 786.

(2) [1896] 1 Ch., at p. 752.

(3) 21 Ch. D., at p. 828.

(4) [1900] 2 I. R., at p. 240.

In this case I do not deem it necessary to decide whether on the facts it would be proper to see the boy. As a matter of judicial procedure, the practice is now on a statutory basis in habeas corpus. But in a Court like this there is a peculiar difficulty, though the King's Bench has resorted to this means of information in *In re Elliott* (2) and *R.* v. *Gyngall* (3). Where the Court consists of several judges—disconcerting and alarming as such an assemblage might be to a child—the judges may each form different impressions; and the interview being of a domestic, private character, there is no note of what has taken place. So, the Court of Appeal has adopted the same course of speaking with the children, *e.g.*, *Andrews* v. *Salt* (4). They might disagree with the result announced below. Possibly the difficulty might be mitigated if a note was kept by the primary judge for confidential use in the proceedings before the Court or on appeal. *In re W.* (5) is the last case of this nature.

For the above reasons, which may be of different weight, but which combined are irresistible, I am of opinion that:—

(1) Story ought not to have the custody of the children, having regard to their welfare, his conduct, and the matrimonial history of the spouses.

(2) Though the refusal of custody is not necessarily inconsistent with Story's right to dictate his children's faith, which the Court might, if it thought fit, safeguard by a discretionary special order, such order cannot here be made, because (*a*) it is not asked

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(1) [1896] 1 Ch., at p. 752.
(2) 32 L. R. Ir. 504.
(3) [1893] 2 Q. B., at p. 235.
(4) L. R. 8 Ch., p. 622.
(5) [1907] 2 Ch. 557.

for; (*b*) because he has by his conduct lost his right; (*c*) because such order would be injurious to the welfare of his children, who must, in their humble position, live with their mother and under her control, and whose well-being, training, and happiness would be prejudicially affected by the change; and (*d*) because such order, while the joint family life continues, could not be effectually carried out.

DODD J:—

I should be well content to let the decision of the Court rest upon the judgments already delivered. But it seems to be the settled practice in applications of this nature for each judge to give an independent judgment, and it is the wish of the Lord Chief Justice that I should follow the practice.

I have endeavoured to qualify myself for the difficult and delicate task by diligent reading of the cases cited during the argument, and many others, to make sure that I have fully grasped the principles of law to be applied to the facts of this case. It was painful reading. It is not the happy side of married life that presents itself in the pages of the Law Reports. But the pain was mitigated by my appreciation of the language in which the principles were expounded. When matters of high moment occupy the mind, they are apt to get themselves expressed in words of perfect fitness. Over and above the literary excellence, I have been impressed by the attitude of the judges; the almost tender solicitude with which they approached the consideration of each case.

I think I am not bound to go over again the legal propositions arrived at by the Lord Chief Justice and Mr. Justice Gibson. I adopt them, and concur in them, and proceed to apply them to the facts, in the spirit, so far as I may attain unto it, of the judges to whom I have alluded. It was laid down in express terms by Lord Redesdale, in *Wellesley* v. *Wellesley* (1), that the father had not the absolute right claimed for at the bar. The right was given to him to enable him to discharge the sacred duty of providing for the maintenance, care, and education of his children.

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(1) 2 Bligh N. S. 124.

But he laid down the corresponding jurisdiction of the Court to control that right for the welfare of the children, those principles underlying all the cases.

I desire, by way of explanation, to say that, while concurring with the Lord Chief Justice as to the application of the Act of 1886, speaking for myself alone, I am of opinion that that Act left untouched the father's right to direct the religious teaching of his child. This was the subject of express decision by Mr. Justice Stirling in *In re Scanlan, Infants* (1). "There are, however, cases in which the father may, even in his lifetime, lose the right to have his child educated in his own religion. This was clearly laid down, and was given effect to in *Andrews* v. *Salt* (2). Lord Justice Mellish says (*ibid.*, 638): 'The law unquestionably does give great weight to the right of a father to have his children educated in his own religion, both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations.' Then further on he says: 'It is clear, however, that a father may, by his conduct, lose his right, even in his own lifetime, and much more after his death. . . .' I may read a few words from the judgment of Lord Eldon in *Lyons* v. *Blenkin* (3), in which he says (p. 262), 'It is always a delicate thing for the Court to interfere against the parental authority; yet we know that the Court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit'—that is, for the benefit of the children."

I again, speaking for myself alone, am of opinion that the Act of 1891, while still further restricting the father's right to custody, leaves untouched the father's right to direct the religious education of his children. It does not put the father's right higher than it was at common law. It does not put the mother's right lower than it was placed by the Act of 1886.

The law on this subject as it now stands after all the decisions, and all the statutes, is put with admirable clearness and precision by Mr. Justice Andrews in *In re Grey* (1). I accept it. "The general principles are well settled that the Court must have careful regard to the welfare of the children, and that the religion of the father is that in which the children are to be brought up. Special circumstances may require additional consideration in particular cases, and what the Court has done in any particular case does not necessarily govern what it ought to do in every other case. Regard must also be had to the particular circumstances of the particular case in which the application is made."

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(1) 40 Ch. D. 200, at p. 208. (2) L. R. 8 Ch. 622. (3) Jac. 245.

If the question of religious education did not enter into this application, there would be no case upon the facts, as already stated, in favour of the applicant. Every fact is against him. The Court would not listen to a suggestion that it should, on the application of a pauper father, an inmate of a workhouse, remove the children from the care of a mother who is devoting her life to their welfare. They are well clad, well cared for, attending school, united together in family life. The wishes of the mother as well as the father have to be had regard to, but above all the welfare of the children, and if it were only their custody that was in question there would be an end of the matter.

The application is made on behalf of the father of these two children, a boy of eleven and a girl approaching eight years of age, to remove them from the custody of their mother, with whom they are at present living, and hand them over to their father. Mr. M'Gonigal states that the reason of the application is, that the father may place the boy in a charitable institution and the girl in another, in which they shall be brought up in the faith in which their father now wishes them to be educated.

It is, as I have said, unlike any other case. The spiritual welfare of the children, according to the father's present view, is to be the sole and determining circumstance. Mr. M'Gonigal, in the event of this Court coming to the conclusion that the custody of the children should not be given to the father, does not ask for any special order such as the Court could, in a fitting case, make, that the mother should have the custody of the children, and that the religious teaching should be given to the father. No such order could or should be made in this case. Nor does he ask for an undertaking from the mother having custody that she would bring them up in a faith against which her conscience rebelled. The results of either of such courses would be appalling.

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(1) [1902] 2 I. R. 684, at p. 691.

The question of questions here therefore is, has the father now the right he claims? He has, unless he has lost it. Has he lost it? I use the most neutral word I can find. The words in which judge after judge refers to what I thus call the loss of his right to dictate the religious education of his children are almost bewildering in their variety—He may "lose" it; he may "abandon" it; he may "forfeit" it; he may "abdicate" it; he may by his conduct "disable" himself from making an application to the Court. He may "disentitle" himself. "He may place himself in such a position as to render it not merely better for the children, but essential to their safety or welfare in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word 'essential' is too strong, it is not much too strong." These are not my words. They are the words of Lord Justice Knight Bruce, when Vice-Chancellor, in *In re Fynn* (1). Lord Esher adopts them, using instead of the word "essential," the words "clearly right for the welfare of the child." I cite them because they put in the strongest terms, in favour of the applicant, what is required to be sustained in the evidence before his parental authority can be displaced. I will accept the word "essential."

There is this result of my reading of the various authorities. There is not a circumstance which was deemed of weight in arriving at a conclusion as to whether the father's right should be superseded that is not present in this case against the father's right. There is here an accumulation of all "special circumstances." I had prepared material with references; but I must remember that this is but a concurring judgment, and I content myself with a summary.

It is a circumstance of considerable importance whether the application is made against a father who has retained the custody of his children, and is discharging the ordinary duties of a parent. Nothing short of misconduct would call forth the intervention of the Court. But if, as here, the application is by a father, who has allowed the children out of his custody, to reclaim them, then the circumstances under which they were allowed to go—the conditions under which they were allowed to live, including their religion, education, when away from him, and the circumstances under which he seeks to recover them, become of the utmost importance, and it is not necessary to prove misconduct.

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(1) 2 De G. & S. 457.

Though I am afraid that is proved very fully against this applicant, I prefer not to rest my judgment upon that. I do so, because, notwithstanding all, he does seem to have endeavoured to keep faith with his wife, and would still perhaps, if left to his own wish.

Just as I have thought it inexpedient to go through the reported cases, so I think it unnecessary to recapitulate the sad facts of this man's life. I have no right to comment—I have no right to punish—I have only to deal with his acts as affecting the welfare of these children, which is my main concern, and only incidentally can I have regard to his conduct to his wife. He became a Protestant on his marriage. He promised her he would adopt her religion; and, of course, that implied that the children should be brought up in that faith. Now this, though it is not a promise that can be enforced in law or equity, on grounds of public policy, still is a circumstance to which weight, and perhaps even great weight, should be attached. His children were baptized as Protestants, and this is an all-important circumstance. He allowed them to be taught according to the Protestant faith. One of the little ones is dead. It is the same family. One is in the graveyard; two are with their mother. But the culminating circumstance is that, up to this, neither child has been in any way perturbed by conflicting creeds. In the unquestioning confidence of childhood they have accepted the truths they were taught by a loving mother, and unclouded by any perturbing influence they have offered up their prayers at their mother's knee. They have done so with the knowledge and approval of the father so long as he lived with them. "To swing them from their moorings" now would be "cruel, injurious, and futile."

Again, it is curious to observe how mundane matters get mixed up with other considerations. It was the duty of the father to provide for his children according to his ability, and his station in life. He has not discharged this parental duty. Great stress is laid upon this also in all the cases. It is a duty of our law, but it has a still higher sanction. It is a sacred duty. "But if any provide not for his own, and specially for those of his own house, he has denied the faith, and is worse than an infidel." He lived with, and to a large extent on, his mother-in-law. She turned him out. He lived for a time with his sister. She turned him out. He is now in feeble health in the workhouse. It is not suggested that he has any hope or expectancy of getting out. It is not even suggested that he has any wish to see his children. The affidavit upon which the case is founded does not breathe a whisper of fatherly feeling. It is in this respect in striking contrast with the affidavits of the wife and her mother. Those do, the wife's tenderly, the mother-in-law's not so tenderly, but still both do suggest a lingering pity for the unfortunate man who has so flung away his own life. His affidavit does not in so many words say that he has again become a Catholic. It may be that it was drafted for him, and does not show him at his best. I cannot question his motive. I must assume it to be religious. But the affidavit does not strike one as manifesting parental solicitude for the welfare, spiritual or temporal, of his children. It may be, probably is, in some way connected with his own position as a penitent. He is not seeking to resume his parental control. He is, in fact, appointing a testamentary guardian.

What would be the result to the children? The family life would be broken up. Both children would be taken from the mother. This is a circumstance upon which judge after judge has laid great stress, no one more eloquently than Mr. Justice Holmes. They would go out into life with a stigma on their birth, and a stain upon their father's and mother's conjugal relations. The mother's house would be left unto her desolate. The children would be broken-hearted. No case anything like this has been presented to a Court. I decline to take the children from their mother.

Solicitors for the applicants: *Croker & Moran.*

Solicitors for the respondents: *Edmondson & Parkes.*

A. E. C.

Appeal.
1915.
Nov. 17.
1916.
Feb. 26.

GILL *v.* GRAINGER BROS. (1).

Employer and Workman—Compensation—Average Weekly Earnings—Workman in Employment for less than three Years—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *sched. I, s.* 1, (*a*) (i).

Section 1, (*a*) (i), of the first schedule to the Workmen's Compensation Act, 1906, provides that, for the purpose of ascertaining the amount of compensation in case of death from injury, where the workman has not been in the employment of the same employer for the three years next preceding the injury, the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of actual employment under the same employer. Section 2 (*a*) provides that for the purposes of the provisions of the schedule, average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated (2).

In a claim for compensation under the Workmen's Compensation Act, 1906, by the dependants of a deceased workman, the only evidence of the earnings of the deceased was a pay-sheet which showed that he had been in the employment of the same employers for twenty-six weeks before his death,

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(1) Before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

(2) The following are the material portions of ss. 1 and 2 of the schedule:—"First Schedule—Scale and Conditions of Compensation.—The amount of compensation under this Act shall be—(*a*) where death results from injury—(i) If the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300 . . . and, if the period of the workman's employment has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer";

"(2). For the purposes of the provisions of this schedule relating to the 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—(*a*) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated . . ." "(*c*) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause."

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and that during that period his weekly earnings had varied, being over £1 in some weeks, and only a few shillings in others.

Held, by the Court of Appeal (Ronan and Molony L.JJ., O'Connor M.R., dissenting), that for the purpose of ascertaining the amount of compensation under s. 1, (*a*) (i), of the first schedule to the Workmen's Compensation Act, 1906, the county court judge was bound to calculate the average weekly earnings of the deceased by dividing the total amount actually earned by 26, the number of weeks worked, and was not at liberty in making the calculation to leave out of account weeks in which only a small sum appeared to have been earned.

Perry v. *Wright* and *Bailey* v. *Kenworthy*, [1908] 1 K. B. 441, considered.

Appeal by Messrs. Grainger Bros., the employers, from an order of the county court judge of Westmeath awarding as compensation under the Workmen's Compensation Act, 1906, for the injury resulting to the dependants of Patrick Gill, a deceased workman, a sum of £160 4s. 6d., being £10 4s. 6d. over and above a sum of £150 lodged in court by the employers.

It was admitted that the workman died as the result of an injury arising out of and in the course of his employment, and the only question was as to the amount of compensation payable to the applicants.

The note of the county court judge as to the evidence before him was as follows:—

"The respondents having paid £150 into court to meet the claim of the applicants, I had only to determine whether that sum satisfied the measure of compensation, having regard to the circumstances.

"Mr. E. A. Shaw produced a note of the days and the number of hours in each when the deceased worked, and argued that the average earnings should be calculated from this. I took the view, however, that because of only a few hours having been worked on some of the days mentioned this would not be a fair basis of reckoning, and after hearing both sides, I found as a fact that fifty-five hours a week was the average worked by the deceased at 4½*d.* per hour, and awarded his dependants compensation accordingly.

"The only witness called or examined was the deceased's widow, whose evidence was of no help save to determine who were the dependants."

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The note produced in the Court of Appeal as that referred to by the county court judge (1) was as follows:—

Statement of wages paid P. Gill during 1914 on Mullingar Sewerage Contract:—

Week ending	July	10th,	£0	14	0
,,	,,	17th,	0	19	10
,,	,,	24th,	1	0	7
,,	Aug.	1st,	0	17	5
,,	,,	8th,	1	1	0
,,	,,	15th,	0	17	7
,,	,,	22nd,	0	18	9
,,	,,	29th,	0	18	11
,,	Sept.	5th,	0	19	10
,,	,,	12th,	1	2	3
,,	,,	19th,	0	17	6
,,	,,	26th,	0	19	10
,,	Oct.	3rd,	1	2	7
,,	,,	10th,	1	1	10
,,	,,	17th,	0	19	5
,,	,,	24th,	1	2	7
,,	,,	31st,	1	1	4
,,	Nov.	7th,	1	1	8
,,	,,	14th,	0	15	8
,,	,,	21st,	1	0	9
,,	,,	28th,	0	17	9
,,	Dec.	5th,	0	2	3
,,	,,	12th,	Not on Sheet.		
,,	,,	19th,	0	15	7
,,	,,	26th,	0	11	10
,,	Jany.	2nd,	0	3	0
,,	,,	9th,	0	15	8
			£22	19	5

Messrs. Grainger Bros. appealed to the Court of Appeal, asking that the award of the county court judge should be set aside, and

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(1) As to this note, see the statement in the judgment of Ronan L.J., *post*, p. 362.

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that in lieu thereof it might be ordered that the amount payable for compensation was £150, on the ground that the county court judge misdirected himself in point of law in holding that the average weekly earnings of the deceased were the sum of £1 0*s.* 7½*d.*, and in his mode of computing the average weekly earnings of the deceased, and, further, on the grounds that there was no evidence to support the finding of the county court judge that the average weekly earnings of the deceased were £1 0*s.* 7½*d.*

J. M. Whitaker, for the employers:—

As the deceased had been less than three years in the employment, compensation is to be calculated on the basis of his average weekly earnings during the period of his actual employment under the same employer: Workmen's Compensation Act, 1906, first schedule, sect. 1 (*a*) (i). The proper mode to determine such average weekly earnings is to divide the total amount earned by the number of weeks worked: *Perry* v. *Wright, Etc.* (1). The statement in the head-note to that case that "days in which no work is done and no wages are earned are to be disregarded," is too wide: *Carter* v. *John Lang & Sons* (2), *per* the Lord President (p. 386); *Anslow* v. *Cannock Chase Colliery Company, Limited* (3), *per* Cozens-Hardy M.R. (p. 356). Average "means something between what you may consider due to overtime and what you may consider due to short time, and the average is to be ascertained . . . by adding them up together and taking the mean": *White* v. *Wiseman* (4), *per* Cozens-Hardy M.R. (p. 356). There was nothing before the county court judge to show why in some weeks only a small sum was earned, and there was no evidence to justify his finding that fifty-five hours a week was the average worked.

Wylie K.C., and *Farrell*, for the applicants:—

The average weekly earnings are to be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated: Workmen's Compensation Act, 1906, first schedule, sect. 2 (*a*); where the employment is

(1) [1908] 1 K. B. 414.
(2) 1 Butt. 379.
(3) [1909] 1 K. B. 352.
(4) [1912] 3 K. B. 352.

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interrupted by absence due to illness or any other unavoidable cause, this period is not to be taken into account: *Ib.*, s. 2 (*c*). Average weekly earnings mean the average earnings which the workman would make in a normal week, if employed on the terms prevailing before and up to the time of the accident: *Perry* v. *Wright, Etc.* (1), *per* Fletcher Moulton L.J. (p. 456). In calculating the average weekly earnings the county court judge was entitled to leave out of account weeks which were obviously not normal weeks. The true test is, what were the earnings in a normal week, regard being had to the known and recognized incidents of the employment. If the work is discontinuous, that is an element which cannot be overlooked: *Anslow* v. *Cannock Chase Colliery Company, Ltd.* (2), per Cozens-Hardy M.R. (p. 355). The county court judge sits as an arbitrator, and is entitled to act on his general knowledge of the labour market and conditions of trade, and to use his good sense: *Roberts & Ruthven, Ltd.* v. *Hull* (3). The amount in dispute here is very small, and in such cases the appeal should not be allowed: *Turner* v. *Port of London Authority* (4).

J. M. Whitaker, in reply.

Cur. adv. vult.

1916.
Feb. 26.

O'CONNOR M.R.:—

This is an appeal from an award of the county court judge of Westmeath under the Workmen's Compensation Act, 1906, in respect of a fatal accident. The workman, Patrick Gill, was in the employment of Messrs. Grainger Brothers, contractors, who were carrying out some sewerage works in and about the town of Mullingar. He had worked for them for about six months, when the accident occurred on the 15th day of January, 1915. The terms of the employment were 4½*d.* for every hour worked. The measure of damages was the sole question before the Court. The evidence offered was of the most meagre kind. Indeed, as I understood from the statement of counsel for the appellant, and as I do from the notes of the county court judge, he had nothing on which to act except a time-sheet from the week ending 10th July,

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(1) [1908] 1 K. B. 441.
(2) [1909] 1 K. B. 352.
(3) 106 L. T. 769.
(4) 6 Butt. 23.

1914, to the week ending 9th January, 1915. There was no extrinsic evidence, and apparently both parties were satisfied that the Court should work on the limited material supplied, viz., the time-sheet.

Now this time-sheet shows great fluctuations in the weekly earnings. They vary from £1 2*s.* 7*d.* down to 2*s.* 3*d.* In one week the workman did not earn anything, presumably because he did not work at all during that week. On this evidence the county court judge had to ascertain the average weekly earnings of the workman, he having been employed for a period less than three years. These average weekly earnings were to be computed in accordance with sect. 2 (*a*) of the first schedule to the Act, that is, "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." How was he to do this? Was it to be a mere arithmetical calculation worked out by a tot of the gross earnings divided by the number of weeks? It is certain that that is not what was intended. The words of sect. 2 (*a*) show that something more than mere arithmetic should be called in aid in the computation of the weekly earnings. This is made abundantly clear by contrast with the computation directed to be made by sect. 1 (*a*) in the case of a workman who had been employed during the three years next preceding the injury. In such cases the computation only involves a sum of addition.

In the present case, no doubt, the county court judge had nothing before him but figures, and it may be said that mere figures do not give materials for anything except an arithmetical calculation. But I think that figures may speak so as to show that a blind acceptance of them is likely to lead to an unfair result. For instance, I take up the time-sheet before me, and it shows weekly earnings during August, September, and October, ranging about 19*s.* or 20*s.* per week. I find that during the week ending the 5th December the earnings were only 2*s.* 3*d.* I am left without any explanation of this small figure; and as I must proceed in the manner *best calculated* to find the rate per week under normal circumstances, I think that I am justified in holding that that was not a normal week, and, therefore, in striking it out altogether from my calculation—that is, the amount of wages

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earned during that week from my sum of addition, and the week itself from my division. Again, I find that the time-sheet shows earnings of 14*s*. for the first week, and a much larger sum earned every week during the next three months; and when I am left without any explanation, I think that I am justified in acting upon what is common knowledge, viz., that workmen are engaged on any day during the working week, and that, in all probability, the first figure in the time-sheet represents only part of a week. Ought not that figure then to be struck out when I am trying to adopt the mode best calculated to give the rate per week, being a normal week as has been decided? There are other figures in this time sheet which in like manner may fairly be struck out in ascertaining the average per normal week. I refer to 3*s*. for the week ending January 2nd. Here, again, there is no explanation of a sum which does not represent even one full day's work. It may have been that the workman absented himself because of the season. It may have been that he was ill. Perhaps he was incapacitated from drink; but it is right to say that there is no evidence of that. In the absence of all explanation, I think again that the figure is not a reliable one in a calculation which ought to lead to a fair result in the computation. There is another week—that ending 12th December—in which the workman did not turn up at all. For similar reasons that may be fairly disregarded. Now, by eliminating the figures I have mentioned, I work out an average of about £1 per week, which, multiplied by 156, brings out £156 as the compensation payable, while the county court judge awarded a slightly higher sum, viz., £160. He was the judge of fact, and unless we are satisfied that he went wrong in principle we ought not to disturb his award.

Counsel for the appellant argued that the finding of the county court judge was against the evidence. The finding was as follows:—"I found, as a fact, that fifty-five hours a week was the average worked by the deceased." That, no doubt, was not the average if every week was brought into the calculation; but I do not think that the language of the finding ought to be read literally. Reading the entire note, I interpret his finding as the declaration of a result arrived at by him in the manner he thought *best calculated* for the computation of the weekly earnings. His note is—" Mr. E. A. Shaw produced a note of the days and the number of hours in each when the deceased worked, and argued that the average earnings should be calculated from this." Now, the only note produced was what is called the time-sheet, and I understand Mr. Shaw's contention to have been that the calculation should have been a purely arithmetical one. This is borne out by the next sentence in the judge's note: " I took the view, however, that because of only a very few hours having been worked on some of the days mentioned, this would not be a fair basis of reckoning." In other words, he did not consider himself bound to accept every week as an element in the calculation—he thought that some ought to be eliminated. The result arrived at may fairly be described as a fact found for the purpose of the award.

In my opinion the mode adopted is in accord with the principles laid down in the leading cases. In *Perry* v. *Wright, Etc.* (1), Fletcher Moulton L.J., says, at p. 456:—" The term 'average earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident." Then after quoting sect. 2 (*a*), namely, " average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated," he says:—" This rule expresses to my mind the dominant note of this part of the schedule. It imposes on the Court the duty of ascertaining what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident, and gives it freedom to do so in the manner best calculated to arrive at a fair result, and I cannot find anything in the schedule which modifies this duty, or takes away this freedom." I cannot help thinking that if in the present case we overruled the learned county court judge, we would be restricting the freedom of action which has been described as the dominant note of the rules.

It is clear, too, from the remarks of the learned Lord Justice on p. 459, that if a workman does not go to work during a particular week, and does not receive any remuneration for it, that week ought not to be taken into the calculation; that is, the week in question should not be included in the divisor. And it

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(1) [1908] 1 K. B. 441.

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seems to me that if a week in which nothing is earned may be struck out, a week in which only a small sum, not representing a full day's work, is earned, may also be struck out.

Of course if the nature of the employment was such as not to permit of continuous employment, and if the breaks in work were thus to be accounted for, this circumstance should be considered, as Fletcher Moulton L.J. has pointed out; but no such case has been made, and, as I recollect, it was admitted that the work was continuous. The works went on without interruption, and employment was always open. I recognize, too, that incapacity for continuous work at full time caused by health or habits may be shown by a time-sheet or other evidence, and that such a personal defect ought to count against a workman in the computation of his average earnings. If it were not to count, the half-timer's dependants would have as good a chance as the full-timer's. But the county court judge has not struck out all the bad weeks, and left in only the good ones. Perhaps he struck out too many bad weeks, but he has struck out only such as appeared to him ought not to be included in a computation which would give a fair reckoning.

It is possible that I would not have arrived at exactly the same result as did the learned county court judge; but he was the judge of fact, and as I cannot find that he went wrong in principle, I cannot overrule him.

Ronan L.J.:—

The report of the county court judge in this case was as follows. [His Lordship read the report, set out *ante*, p. 355.]

The document produced to us as "the note" referred to is as follows. [His Lordship read the note, set out *ante*, p. 356.] It does not appear to correspond with the description. Our registrar wrote to the county court judge enclosing the copy of the note produced to us, and asking if he could furnish us with any other document. He replied that he could not; that he could not remember if this was the document he had before him. We asked counsel if any other document could be produced, and they replied, "No." We must, therefore, take this document as the entire evidence in the case.

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It deals with a period of twenty-seven weeks. Something was earned every week but one. It is suggested that the first week may have been a broken week. I shall assume in favour of the workman that there were only twenty-six weeks in all (half a year), and that the total earnings were £23 in twenty-six weeks. The judge then says, having only this evidence before him :—"I found as a fact that fifty-five hours a week was the average worked by the deceased at 4½*d.* per hour." Fifty-five hours per week would mean probably ten hours on five days and five hours on Saturday, which would give the exact figure. Fifty-five hours at 4½*d.* would be £1 0*s.* 7½*d.* When the judge says he found *as a fact* that fifty-five hours a week was the average that the man worked, he cannot mean this, as at that rate he would have earned £23 in less than twenty-three weeks, and over £26 in the twenty-six weeks of the employment. Such a finding, so far from being a legitimate inference from the evidence, would be a direct finding contradicted by the entire evidence. The only legitimate inference that the judge could have drawn from the evidence was that fifty-five hours constituted a normal week of six days, and that the normal wages for a full week's work was £1 0*s.* 7½*d.* The evidence further proves beyond doubt that the man only worked something less than a number of hours that would make twenty-three of such weeks, and that for a number of hours making up more than three weeks of the twenty-six he did not work. The practice in the cases has been to calculate weeks in this way. Lastly—and this as will be seen is a vital matter—there is absolutely no evidence to show why he did not work for the three weeks of the period of the twenty-six weeks uncovered by the £23. The evidence is a blank. There is not a scintilla of evidence that he did not work on any day on account of illness, drink, or idleness, or that he ever failed to do work when he could get it. There is nothing to show that there was work for him if he chose to do it. There is no evidence that he failed to earn any money because the works were closed on certain days; because he came for work and could not get more than he did; whether he was ill or drunk; whether the work was there for him and he did not choose to take it. The Master of the Rolls in the present case seems to assume that it was through idleness, and says it was admitted that there was work always for him. It certainly was not admitted on the argument before us, and there is no suggestion of anything of the kind in the judge's note or order. The judge then takes this full week's rate of pay, and treats it as the average weekly earnings during the twenty-six weeks, multiplies it by 156, and brings out the compensation at £160 10*s.* 4*d.* I should make it £160 17*s.* 6*d.*, but the difference is immaterial. This would bring out his total earnings in the twenty-six weeks at over £26. I am of opinion that on any view of the law this finding was not authorized by the evidence; but it is impossible to deal with the matter properly until I have explained the serious legal difficulties which arise in this little case.

The main question will be found to come to this. In ascertaining the compensation payable on death in the case of a man who has been less than three years in the employment, are his *actual earnings* while *in the employment* to be taken into calculation at all, or is it simply to be determined by the rate of wages which could have been earned, irrespective of what he in fact earned?

Prior to the Act of 1906 there can be no doubt that the actual earnings were the basis of calculation. Prior to that Act, apart from the statutory fixed maxima and minima, the main protection of the employer was that actual earnings are in all cases at the root of the compensation. His liability is to be measured in all cases by considering what he has in fact paid the man in the past, not by what the man could have earned if the conditions of employment had been different; if he had been more attentive to his work; if he had not been prevented by ill-health or other causes from working.

The Act of 1880 provided that the compensation should not exceed "the estimated earnings, during the three years preceding the injury," that is, the sum paid by the employer to the workman as nearly as could be ascertained. There is no possible doubt as to this.

Schedule I to the Act of 1897, which is, for the purposes of this case, identical with sects. 1 (*a*) and (*b*) of Schedule I to the present Act, provided for cases of death, and other cases. It did not deal with "estimates." It provided for a definite sum, leaving no discretion in case of death. It provided equally definite maxima only, in other cases. But both the definite sum and the maxima depended on the actual earnings of the workman, *i.e.* the sum actually paid to him by the master in the past, not what he might, could, or would have earned during the period of his past employment. It also provided the specific periods during which the earnings or payments by the master were to be taken. They were, in cases other than death, twelve months previous to the accident, or, if workman was not so long in employment, the actual period of his employment; in case of death, three years previous to the accident if so long in employment, if less, the actual period; and in the latter case the amount of compensation was ascertained by a process of division and multiplication of the total earnings during this shorter period. The Act of 1897 assumed that there was no difficulty in calculating the amount of compensation in case of death, or the maxima in other cases, once given the total actual earnings and the specified period. In every case the employer was protected by the fact that his actual payments to the workman were at the root of his liability.

If we examine the first schedule, section (1) (*a*) (i) of the Act of 1897, we find it begins by stating that the amount of compensation shall be " a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury," with a maximum of £300 and a minimum of £150. This is the only statement of the measure of compensation in the sub-section. It applies to all cases in the sub-section. It is to my mind the key to the entire section (1) (*a*) (i), and states the basis and principle of the sub-section. It carefully limits the employer's liability to the amount of his past payments to the workman. The rest of the sub-section is really only a provision for applying this principle to cases where it is impossible to get this amount by mere addition, owing to the fact that the employment has been less than three years. In such cases resort is had to a statutory fiction, " then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the same employer." There is no doubt that the "three years" mean the actual 156 weeks preceding the injury, and if we substitute 156 weeks for three years in the section, I confess its meaning appears to me plain beyond doubt.

The object of the statutory fiction was practically to ascertain what the man would have earned if the employment had lasted the full time; it was to ascertain as nearly as could be the compensation on the principle of the opening words of the section. Lord Macnaghten sums up the effect of s. (1) (*a*) (i) of the Act of 1897 with his usual felicity. The compensation "is to be £150 or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident": *Lysons* v. *Andrew Knowles & Sons, Limited* (1). Surely the object of the hypothesis must be to get as nearly as possible to what the actual amount would have been if ascertainable. The question is, how is "the hypothetical amount" to be ascertained?

Dealing with a "deeming" clause, in *Hill* v. *East and West India Dock Co.* (2), Lord Cairns (adopting the words of James L.J.) says: "Where a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." He adds, "where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions."

In 1761, Lord Mansfield said, in *Morris* v. *Pugh* (3): "Fictions of law hold only in respect of *the ends and purposes for which they were invented*; when they are urged to an intent and purpose *not* within the reason and policy of the fiction, the other party may show the truth."

The decision of this case partly depends on the application of the statutory fiction. It is the only one of the four cases of compensation which has a "deeming clause," or involves a statutory fiction.

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(1) [1901] A. C. 79, at p. 93.

(2) 9 A. C., at p. 456.

(3) 3 Burr., at p. 1243.

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The sub-section deals with two cases:—1. Where the employment has lasted three years or 156 weeks. This I shall call (X). 2. Where it has lasted any number of weeks from 1 to 155. This I shall call (Y). Applying Lord Cairns's principles, it would appear to me clear—(1) That the object of the fiction was to place a man in (Y) as far as possible in the same position as in (X). 2. That it was not intended to operate so as to put a man in (Y) in a better position than if he had been in (X). (3) That it was not intended to deprive a man of part of his compensation because he had completed the full term of (X). (4) That the limit of the employer's liability is not to be increased *solely* on the ground that the workman has not completed the full term of three years. (5) That it was not intended to make it the interest of the workman not to remain three years in the same employment. I think that a construction which operates to effect No. (1) will, in Lord Cairns's words, "keep exactly within the purpose for which the statute was passed"; and that a construction which has the effects stated in (2), (3), and (4), also in his words, "would do great and unnecessary injustice." It is between the two constructions that we have to choose in the present case.

I shall take, first, an extreme case as an illustration. The wages in the employment are £1 per week. *A* works every week in the year, and earns £52 a year. *B* is an idle, dissipated man, and he works only irregularly. His entire actual work results in only £26—that is, he really has worked only twenty-six weeks in the year.

Case (1). They are killed by accident after three years' employment. *A*'s compensation is 3 × 52 = £156; *B*'s compensation is 3 × 26 = £78.

Case (2). They are killed after two years in employment. The measure of compensation is the "actual or the hypothetical amount" of their earnings during the three years. This latter is "156 times their average weekly earnings during" the two years. In *A*'s case the average is $\frac{\pounds 52 \times 2}{104} = \pounds 1$; compensation, £1 × 156 = £156. The statutory fiction works all right. One would have thought that in *B*'s case the average would have been $\frac{\pounds 26 \times 2}{104} = 10/\text{-}$, and the compensation, 10/- × 156 = £78; also apparently all right.

This is the view of the section that I certainly should take apart from authority. The authorities, however, require the careful consideration of another view, viz., that "average weekly earnings" during two years does not mean the average of what the man did earn, but the average of what he *might* have earned, and that as *B might* have earned £52 a year if he had worked as *A* did, the average weekly earnings of *B* should be the same as that of *A*, viz., $\frac{\pounds 52 \times 2}{104} = \pounds 1$, and his compensation £1 × 156 = £156. It is obvious that in such a case as this the statutory fiction is only necessary for the third year: you have the actual earnings for the first and second. How does it work? It not only makes the hypothetical earnings for the third year £52, but it converts the actual ascertained earnings for the two years (£52) into £104; or, if you take the £52 for the first two years at the actual figure, it leaves £104 for the third year, or double the amount that could possibly be earned in that time.

I have taken the figures of two years and £1 a week for convenience. Of course, the statutory minimum would interpose in *B*'s case; but if the weekly wages were £2 instead of £1, the case would be the same, and the minimum would not apply.

If the two men were 155 weeks in the employment, the same principle would apply. You would then have either to double the actual earnings of 155 weeks worked, or allow £78 for the last week of the 156. Precisely the same result would arise if, as in the present case, the men had been only six months in the employment.

I have taken the case of a man choosing only to work half time. If he worked three-quarter time, the disparity would be only half what I have shown. If eleven-twelfths of the time, that is if he took a month's holiday in the year, it would be one-twelfth.

It is obvious that this mode of taking the average weekly earnings makes the rate of wages in the employment the sole measure of the compensation in cases where the man has been less than three years in service, and makes *the amount of his earnings*

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wholly immaterial, although this is the sole test if he completes the three years. If the Act meant this, it would have been very easy to say that the compensation should be "a sum equal to 156 times the weekly wages he could have earned in the employment." But why this should be the test in the case of a man who was 155 weeks in service and only worked half time, but that if he was 156 weeks he should only be entitled to half this amount, passes my comprehension. It certainly is a curious construction to put on a section which says in general terms that in all cases "the compensation shall be a sum equal to his earnings during three years," that when you have to estimate this you are to leave entirely out of account what the actual earnings were. It really invents and introduces another statutory fiction, viz., that in the second case "earnings shall be deemed to mean not what has been earned, but what might have been earned in the employment."

The recent case of *Greenwood* v. *Nall & Co.* (1) affords a concrete instance of what I have been dealing with. There the man had been three years in the employment. He had been absent from work through illness for various periods amounting to six months. The total earnings in fact were £168 13*s.* 5*d.* The average weekly wages were £1 7*s.* 3*d.* This multiplied by 156 weeks would have given £212 11*s.*, the probable normal earnings. The Court held that as he had been three years in the employment no question of average arose, and that his representative was entitled only to the £168 13*s.* 5*d.* There can be no doubt that if he had been one day less than the three years in the employment, the representative would, on the principle I have been contending against, have been entitled to the £212 19*s.* 9*d.*

Nothing but clear authority that I should follow would incline me to accept this construction of the section. It appears so grotesque in its results, so unjust to the employer, so inequitable as between the man who has served 156 weeks and the man who has served a less period, so wholly inconsistent with the principles laid down by Lord Cairns, that I certainly shall not accept it unless compelled by authority.

I cannot, however, fail to see that the authorities dealing with

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(1) [1915] 3 K. B. 97.

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compensation in cases of *non-fatal accidents*, Schedule I (*b*), certainly are strongly in favour of construing "average weekly earnings" as equivalent to rate of wages, and of treating the actual earnings as irrelevant except for the purpose of ascertaining the rate of wages, and also of deeming earnings not what was but what might have been earned.

Under the Act of 1897 there was no doubt as to the meaning of "average weekly earnings." It meant the actual earnings during the specified period divided by the number of weeks.

This is clear from the judgments of the House of Lords in two cases of *Lysons* v. *Andrew Knowles & Sons, Limited*, and *Stuart* v. *Nixon & Bruce* (1), heard together. One was a case of injury under sect. 1 (*a*); the other a case of death under sect. 1 (*b*). In each case the man had been only a few days in the employment. The Court of Appeal (2) held in both cases that as there could be no average unless there were at least two weeks' earnings, there could be no compensation. The House of Lords (1) reversed the decisions. I cite the case for the judgments on the meaning of "average weekly earnings." The judgments dealt with the two cases together on this matter. Lord Halsbury said (p. 87):— "It was obvious, I should think, to anyone, that everybody is not paid by the week, that you cannot have the exact thing made ready to your hand to enable you to find out how much the weekly payment is to be. You must split up that which is what I call the aggregate payment, whether it is by the year, or the month, or what not, into such proportions in relation to his weekly earnings that the week's payment, or rather, as it was described, the payment in respect of the week, should be arrived at. How was that to be done? It seems to me that the Legislature, in using the phrase that you must take the average of the earnings for the week, did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in arithmetic he was not to get it at all; but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word 'average.' I do not myself feel very much impressed by the discussion which we have had as to what the word 'average' strictly means.

(1) [1901] A. C. 79. (2) [1900] 1 Q. B. 780; [1900] 2 Q. B. 95.

I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another, or one week with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' . . . ." The judgments of the other Lords to the same effect will be found at pp. 93, 94, 98, 99, and 100. These judgments as far as I know have never been questioned. They defined "average weekly earnings" plainly as meaning "earnings taking one week with another," "splitting up the aggregate payment."

Now that decision was in December, 1900. In 1906 the Legislature in schedule I (1) re-enacted, in identical terms, Schedule I (1) of the Act of 1897, on which the House of Lords put the above construction. I take it to be clear that, unless it is altered by something else, the same words must bear the same meaning in the re-enacted section. I also take it (if it stood alone) to be clear that if a man earned or was paid by his employer £52 wages during a year's employment, his average weekly earnings would be £1 per week during the 52 weeks of the year, and that his earnings during three years should be taken at £156.

Section (2) of schedule I to the Act of 1906 is new. It does not purport to alter the measure of compensation contained in s. (1). It is difficult to conceive that schedule I of the former Act would have been retained without alteration if this were intended. It is plain, however, that in such cases as *Lysons'* and *Stuart's* (1), when the man was only a few days in the employment, it was really impossible to apply the test of average, as the decision of the Court of Appeal shewed. It might also be impossible to get the actual figures of the earnings, if, for example, as Lord Cozens-Hardy suggests, the books of the firm had been burned. Schedule I (2) of the Act of 1906 provided for such cases by allowing an estimate to be made in such cases. We need not deal with this, as here we have the actual figures for half a year. This is a case of computing, not estimating, the earnings and the average earnings.

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(1) [1900] 1 Q. B. 780; [1900] 2 Q. B. 95; [1901] A. C. 79.

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The whole question of law in this case will be found to come to this: Have the words in section (2), which I shall now read, the effect (*a*) of substituting for "earnings" in section (1) "what might have been earned," and (*b*) thus entirely eliminating the actual amount of the earnings from the calculation, either of the sum equal to "the amount of his earnings" in sect. 1 (*a*), or "his average weekly earnings" in sect. 1 (*b*) and (*c*), and consequently necessarily producing the extraordinary results I have shown. [His Lordship read sect. 2 (*a*) of the first schedule to the Workmen's Compensation Act, 1906.] Does this abolish "average weekly earnings," and substitute something wholly different, called "rate per week at which the workman was remunerated"? Does this simply mean the rate of wages?

If the wages are £1 per week, that is of course the rate. If the work is irregular, and the man does only 26 full weeks' work and earns £26, the rate is evidently £1 per week. It is the same if he works 52 weeks and earns £52. The total earnings, divided by the number of weeks worked, give the rate of wages. Where the wages are regular, as in the case of £1 per week, no calculation is necessary. If the works are going every day in the year, the possible earnings will be the rate multiplied by 52. If they are open only for 50 weeks, the possible earnings will be the rate multiplied by 50. The actual earnings can, however, only be got by taking the rate multiplied by the actual number of weeks worked. But the number of weeks worked, though it determines the amount of the earnings, does not affect the rate of wages.

Is the "rate" substituted for the "average weekly earnings"? If it is, on the death of a man who works half-time, from ill-health, drink, or idleness, the compensation will be £156 (£1 × 156) if he has been less than 156 weeks in the employment, and £1 × 78 = £78 if he has been 156 weeks. This last is settled beyond all doubt.

This elimination of the actual earnings in the calculation of the "average weekly earnings" is really based on two cases, in neither of which it arose, and in the first of which, the case supposed to have settled the law, it could not have arisen. They were both cases of injury, not cases of death under sect. 1 (*a*).

As the judgment of Fletcher Moulton L.J. in *Perry* v. *Wright* (1) is really at the foundation of all the other cases, I must deal with it in detail. Some of the figures are a little obscure, but this is entirely cleared up in the subsequent case of *Anslow* v. *Cannock Chase Colliery Company* (2), with which I shall deal afterwards.

Now, the first part of the judgment deals generally with two cases in which it was not practicable to compute, and one in which it was. It is difficult to determine how far any observation applies to each class. They were all cases under sect. 1 (*b*). *Bailey's Case*, the one in which computation was practicable, was a case of 12 months', or 52 weeks', employment, and the compensation was a weekly payment not exceeding "50 per cent. of his average weekly earnings" during these 12 months. He worked full time. This would seem plain enough. *Lysons' Case* (3) apparently fixes it—the average of the 52 weeks, "taking one week with another." But at p. 455 Fletcher Moulton L.J. says: "Although the provisions of the Act give to this phrase [average weekly earnings] a special meaning dependent on the terms of the Act itself, these provisions do not, in my opinion, displace the natural meaning of the term itself, but only render more definite the mode of arriving at the figure which represents it. . . . The object of the schedule is to arrive at a fair estimate of what the man was earning at the date of the accident."

A man earns £1 per week for 48 weeks, and £2 per week the last four prior to the accident. There is no doubt as to what he was earning at the date of the accident—£2 per week. His total earnings for the 52 weeks, £48 + £8, = £56. Were his "average weekly earnings" during the 52 weeks £2 a week? Is this the "natural meaning" of the average during the 12 months, or the "special meaning" "dependent on the terms of the Act"? There was no question of grade in *Bailey's Case*.

At p. 456 the Lord Justice says: "The schedule imposes on the Court the duty of ascertaining what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident. . . . It is intended that the 'average weekly earnings' should be a real, and not an artificial, estimate of what rate of remuneration the workman might fairly be held to be enjoying at the date of the accident." At p. 460 he speaks of "the more difficult case where the compensation has to be arrived at by determining through an average the rate of remuneration at the date of the accident." So that the "average" is only the means of ascertaining the rate of remuneration *at the date of the accident.* Finally, in the special judgment in *Bailey's Case* (1), he says: "The accident was not a fatal one, so that we have to ascertain the rate at which the workman was being remunerated at the date of the accident from a consideration of the earnings in the 12 months immediately preceding the accident."

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(1) [1908] 1 K. B. 441.
(2) [1909] 1 Q. B. 352.
(3) [1901] A. C. 79.

I think it is plain from all these passages that "the special meaning" given to "average weekly earnings" by the provisions of the Act is "the rate of remuneration at the date of the accident." I can find no other special meaning in the judgment. If it is the special meaning, I cannot see the difficulty of ascertaining it where you have the actual figure.

The "average weekly earnings" are mentioned three times in s. (1), but in each they are expressly those during a specified ascertainable period. In s. (2) (*a*) they "shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." This clearly means during the specified periods. It does not strike out the periods and substitute "the rate at the time of the accident."

Sect. (2) (*a*) further says, "where it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person" in a similar position—not the rate at which such a person "was being remunerated at the date of the accident." I cannot find that there is in the Act or Schedule the expression "rate of remuneration at the date of the accident," or any similar expression, or anything even suggesting that this is what is to be ascertained. I have not found it stated by any other judge. For a long time I could not find out where the Lord Justice got the expression he repeats with such emphasis. However, I think I have found it at p. 458, lines 7 and 8. It will be seen that he reads the words in s. (2) (*a*), "impracticable at the date of the accident to compute the rate of remuneration," as if they were "impracticable to compute the rate of remuneration at the date of the accident." This is the only explanation I can find for his laying down that "average weekly earnings during twelve months preceding the accident" (s. 1 (*b*)) means the rate of remuneration at the date of the accident.

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(1) [1908] 1 K. B., at p. 465.

Having raised up this test, the greater part of his judgment is a curious effort to get rid of it. It is obvious that if a man was getting 30*s.* a week for forty-eight weeks, and wages fell to 15*s.* per week the last four weeks of the year, it would be very hard on him if his average earnings during the year were to be judged by the rate of remuneration at the date of the accident. Accordingly we find, at p. 455, that the "special meaning" does not "displace the natural meaning." He does not tell us what the natural meaning is, though it is not displaced by the other; but he says "it renders more definite the mode of arriving at the figure." If the natural meaning of average earnings during fifty-two weeks is got by dividing the total by fifty-two, I confess I am unable to follow how saying that "what you have to ascertain is the rate of remuneration at the date of the accident," renders the mode of arriving at this average more definite. In fact, I cannot understand how the special meaning operates to modify, if it does not displace, the natural meaning altogether. He then says the special meaning is obviously unfair. Then comes a very curious passage—very difficult to follow—ending with this: "In my opinion, therefore, the term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident." This would seem to abandon the "remuneration at the date of the accident," and substitute normal week during the prescribed period; but the passage at the foot of the page shows that this is really the old "remuneration at the date of the accident." The second paragraph on p. 458 appears again to abandon the "date of the accident." The Lord Justice says that a point of great importance to be decided is "whether in an

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ordinary case the average weekly earnings are to be calculated by dividing the total earnings during the relevant period"—this must mean the prescribed period—"by the number of weeks in that period, or by the number of weeks actually worked." He takes a period of fifteen weeks, and a man voluntarily absenting himself for one of them, and proceeds: "Now, if a person who is in receipt of £2 per week chooses not to go to work during a particular week, and, therefore, does not receive any remuneration for it, it does not alter the fact that the rate at which he was being remunerated was £2 a week. I have therefore come to the conclusion that in the case to which I have referred the division is to be the number of weeks worked, namely fourteen." He says (p. 458): "This question has, I confess, given me great difficulty, and I cannot say that the words of the Act leave it free from doubt."

Now, as the judgment of the Master of the Rolls in the present case is to a great extent based on this passage, I must examine it closely. The Act says, "the average weekly earnings during," to take his case, fifteen weeks. The Lord Justice starts with the "average weekly earnings" during the "relevant period," fifteen weeks. The total earnings are £2 × 14 = £28. Does he really mean that the average earnings during the fifteen weeks are $\frac{£28}{14} = £2$. No. He shifts the words. He states the problem as "average weekly earnings during the relevant period." He then drops this, and substitutes a rate of remuneration. The Lord Justice next explains normal week as weeks during which from the nature of the employment work is done, as distinguished from recognized holidays or periods in which no work is done. He says:—"Let us assume . . . £2 per week wages at a mill which is closed for holidays for two weeks in the year. The wages earned by such workmen are represented by fifty times £2, not by fifty-two times £2, and the employer has a right to claim that this shall be recognized in calculating the average weekly earnings" (What about the rate of remuneration?). This is the correction to be applied to the broad definition of average weekly earnings "as the average earnings in a normal week" already quoted. The total earnings are £100; the average of the normal weeks would be £2; there are fifty of these, but the relevant period is

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fifty-two. The average for the relevant period must be recognized in the calculation. How? Plainly by proportion.

The weekly average for a total sum is obviously less for a period of 52 weeks than for a period of 50. The proportion therefore is, £2 (the average for 50) : x (average for 52) : : 52 : 50. $x = \frac{£2 \times 50}{52} = \frac{£100}{52}$, or the average according to *Lysons' Case* (1), the ordinary meaning of the word. Further, the average of the 50 normal weeks is $\frac{£100}{50}$, of the 52 statutory weeks $\frac{100}{52}$. The difference between the two is $\frac{2}{52} = \frac{1}{26}$. It is a simple arithmetical fact. If you take £52, total earnings, and any number of normal weeks out of the 52 weeks, say 39, then the average of the 39 will be $\frac{£52}{39} = \frac{4}{3}£ =$ £1 6*s*. 8*d*. Now, take 39 from 52 = 13. Substract $\frac{13}{52} = \frac{1}{4}$ of £1 6*s*. 8*d*. from

$$\begin{array}{rrr} £1 & 6 & 8 \\ 0 & 6 & 8 \\ \hline £1 & 0 & 0 \end{array}$$

The process has the same result as the original division of £52, total earnings, by 52 total weeks. It is, as I have said, a simple proposition of arithmetic. If you take a total sum, say £104, and, to use Lord Halsbury's phrase, " split it " over weeks, and take the average for any number, say 26 weeks, and get the average £4, the average for a longer period, say 78 weeks, can be got by subtracting from this average of £4 a fraction of itself equal to $\frac{78 - 26}{78} = \frac{52}{78} = \frac{2}{3}$ of £4. This will give $\frac{1}{3}$ of £4, or £1 6*s*. 8*d*. But the same result is got at by dividing the £104 by 78; $\frac{£104}{78} = \frac{4}{3}$ £1, or £1 6*s*. 8*d*. This system of taking the normal average and deducting the fraction is only a circuitous mode of taking the common average.

This curious judgment is really an attempt to escape from "remuneration at date of accident." The first step is the average of normal week, which is "broadly" substituted for "the remuneration at the date of the accident." The second step is the employer's right to have the difference between the average of the normal weeks in the statutory period and that of the actual number recognized in the calculation, and so prevent the "natural meaning" of average being displaced by the "special meaning." This deprives the normal week of any operation, and makes the calculation simply "the average of the prescribed weeks," taking one week with another.

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(1) [1901] A. C. 79.

In this special judgment in *Bailey's Case* (p. 465) the Lord Justice first returns to the old test:—"The accident was not a fatal one, so that we have to ascertain the rate at which the workman was being remunerated at the time of the accident from a consideration of the earnings in the twelve months preceding the accident if he was in the same employment within the meaning of sect. 2 (*c*)." This passage is important as showing that he was not dealing with cases under sect. 1 (*a*) of fatal accident. He arrives at the conclusion that sect. 2 (*c*) has no application to the case. He then says "the work was continuous except for certain holidays . . . and various short stoppages on account of accidents to machinery," &c. There was no illness or voluntary absence on the part of Bailey. He proceeds:—"I am therefore of opinion that we have here the earnings of a" (it should be "the") "complete twelve months which we are entitled and required to use for the purpose of obtaining the average weekly earnings." During what period? The Act says, "the twelve months." The "rate of remuneration" entirely disappears. He proceeds:—"I will assume, for the sake of clearness, that the total of the stoppages from recognized holidays amount to two weeks, and that the remainder of the interruptions from accidents and other causes amount to one week. It appears to me that the right method of proceeding is to say that the sum-total of the earnings, namely, £83 2*s.* 1*d.*, was earned by forty-nine weeks' work, and the average per week thus obtained will give the average wages earned in a week of full work. But there are only fifty weeks of full work in the year, and therefore the average earnings in a week" (this means in a period of fifty-two weeks) "would be less than the figure so obtained by one twenty-sixth part, or about 4 per cent. In other words, the average earnings in a week of full work are to that extent higher than the average earnings in the employment, because there is incident to it an enforced idleness of two weeks in the year."

Now he says, $\frac{1}{26}$th $= \frac{2}{52}$, or *about* 4 per cent. He did not mean $\frac{1}{25}$ or $\frac{2}{50}$, which would have been exactly 4 per cent., still less $\frac{2}{49} = \frac{1}{24\frac{1}{2}}$. The only figures he takes are the total earnings, the fifty normal weeks, and the fifty-two actual weeks, and he subtracts $\frac{2}{52}$ from the average of the normal. This, as I have already shown, is simply the arithmetical equivalent of dividing the total earnings by the fifty-two weeks. The forty-nine weeks actually worked disappear entirely from the calculation. He simply divides £83 2*s.* 1*d.* by fifty, and subtracts from the quotient $\frac{1}{26}$th or $\frac{2}{52}$ of itself. The case, therefore, is a decision that the normal week is entirely unnecessary; that the practical mode of arriving at the average weekly earnings for a given number of weeks is to divide them by that number.

He then says that if the third week was normal he would have treated it the same way, that is, forty-nine would then have been the number of normal weeks. He would then have divided the £83 2*s.* 1*d.* by forty-nine, and from the quotient subtracted the $\frac{3}{52}$ of that quotient. This, again, would simply be the arithmetical equivalent of dividing the £83 2*s.* 1*d.* by fifty-two.

The case is really no authority on the question as to whether the effect of Schedule I, sect. 2, is to substitute the "rate of wages" for the average earnings in sect. 1, as the man had worked full time, and the distinction is immaterial in the case. The dictum as to the effect of voluntary absence from work (which did not arise in the case) is really its only bearing on the present case. As to this dictum the effect is this. If the master has work and offers it to the workman for a period, and he prefers not to work, the compensation is to be assessed as if he had worked during the time and earned the money; but if the man is willing to work, and, owing to the nature of employment, the master cannot give it to him, then the compensation is to be assessed on his actual earnings. Cozens-Hardy M.R. takes a wholly different view (p. 454). The county court judge having divided by fifty-two, he says:—"In my opinion this was wrong." (*a*) "Days during which no work was done ought not to be taken into account... The £83 2*s.* 1*d.* ought to be divided, not by fifty-two, but by the actual weeks or portions of weeks during which the work was done" (that was forty-nine). (*b*) "This is in accord with the general scheme of the Act, and the interpretation placed by me on s. 2 (c.)." (*c*) "It was not Bailey's fault that the mill was shut down during any of the periods." (*d*) "His absence from work was unavoidable so far as he was concerned."

A more complete divergence from the conclusions of Fletcher Moulton L.J. it is impossible to conceive—(*a*) The Master of the Rolls holds that the divisor must be simply 49. He ignores the distinction between the two weeks normal and the one abnormal. He rejects the subtraction of the $\frac{1}{26}$, $\frac{2}{52}$, or $\frac{3}{52}$. (*b*) Fletcher Moulton L.J. held that section 2 (*c*) did not apply. (*c*) Fletcher Moulton L.J. held that at least two of these weeks should be included in the divisor (by the subtraction of the fraction). (*d*) The Master of the Rolls plainly implies that voluntary or avoidable absence should count against the workman. Fletcher Moulton L.J. laid down that it should not.

However, the *result* of the Master of the Rolls is clear; it is that $\frac{£83\ 2s.\ 1d.}{49}$ is the average. It is equally clear that the result of Fletcher Moulton L.J. was that it was not; that it was to be divided either by 51 or 52. Farwell L.J. agreed with both as to the result. I am not surprised that the case was compromised. *Bailey's Case* was the only case in *Perry* v. *Wright* (1) dealing with the mode of computing the average; and in it the man worked full time, so that the distinction between actual earnings and what he could have earned did not arise at all.

With this complete divergence between the Master of the Rolls and Fletcher Moulton L.J., it is to be regretted that Farwell L.J. took the course of saying that as his conclusions were based on somewhat different reasons, which perhaps were not altogether consistent with those given by the Master of the Rolls and Fletcher Moulton L.J., he had thought it best, in the interests of the public, not to run the risk of delivering a judgment he had prepared.

(1) [1908] 1 K. B. 441.

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The head-note of the case follows the judgment of the Master of the Rolls, and entirely ignores that of Fletcher Moulton L.J.: "In an ordinary case the average weekly earnings are to be calculated by dividing the total earnings of the workman during the relevant period" [in that case 52 weeks], "not by the number of weeks in that period, but by the number of weeks actually worked within that period; days in which no work was done and no wages are earned are to be disregarded. But this principle does not apply to cases under sect. 1 (*a*) (i) of the first schedule." The former proposition we shall see has been said "to require amendment." I am not aware that the latter has ever been disapproved of. In the present case the county court judge has acted on the former and ignored the latter.

The whole case, so far as it deals with computing the average where there are full materials for doing so, is unsatisfactory; but it is clear that no question could have arisen as to a man not working full time, or as to any distinction between actual and possible earnings in the employment. The extraordinary thing is that it is supposed to have settled the law.

Fortunately the next case, *Anslow* v. *Cannock Chase Colliery Company, Limited* (1), is much plainer. It came before the same three judges about a year later. It was also a case under schedule 1 (1) (*b*) of a man injured after 52 weeks in the employment. The facts were these:—

(1) Man actually worked	...	33 weeks
(2) No work done—		
(*a*) Illness ...	...	2 "
(*b*) Voluntary absence	...	1 "
(3) No work done—		
(*a*) Holidays and wakes	...	2 "
(*b*) Because work short, and because trade slack	...	14 "
Total number of weeks,		52 "

Here we have the element of three weeks when wages could have been earned, but were not, which was absent in *Bailey's Case*.

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(1) [1909] 1 K. B. 352; [1909] A. C. 434.

We have not the element of the work being stopped by accidents, as in the one week in *Bailey's Case* (1). The total earnings were £68 odd and an allowance. They were taken in the case at £68. I shall substitute £66 for simplicity. The county court judge held that No. (3), 2 + 14 = 16 weeks, were normal and recognized incidents of the employment. Therefore, there were 52 – 16 = 36 normal full working weeks.

On the part of the applicant, it was argued before the county court judge that the total earnings should be divided by 33; on the part of the employer by 52. The county court judge divided the £66 by 33 = £2. He then took the difference between 52 and 16 = 36 as the full number of working weeks.

He then deducted from the £2, $\frac{52-36}{52} = \frac{16}{52}$ of £2 = $\frac{4}{13}$ of £2, £2 – $\frac{4}{13}$ £2 = $\frac{9}{13}$ of £2, as the average weekly earnings, and awarded half this as weekly payment, the maximum under the section.

The applicant appealed. The sole point argued was whether the principle of the judgment of Fletcher Moulton L.J. as to subtracting the $\frac{16}{52}$ was right. There was no appeal by the employer, and no objection taken to the way the judge treated the two weeks' illness and the one week's voluntary absence. The respondent's counsel were not called on. *Bailey's Case* (1) was the only authority cited.

Cozens-Hardy M.R. (2) reads the words of schedule 1, 2 (*a*):—"Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman is remunerated . . . But the sum arrived at by the fraction $\frac{68}{33}$ does not represent his earnings in a normal week" (No, but it represents his earnings in a week full of work, as Fletcher Moulton L.J. shows in *Bailey's Case* (1). It gives the *rate of wages* for full time per week), "or his average earnings during the whole twelve months. It represents only the average during a portion of the year, namely, during the thirty-six weeks when the colliery was working." (No, it only shows the average during thirty-three weeks.) "In other words, the true result is represented by the fraction $\frac{36}{52}$ of $\frac{68}{33}$." On the admission of the respondent s counsel I think this was right.

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(1) [1908] 1 K. B. 441.

(2) [1909] 1 K. B., at p. 355.

This shows clearly that Cozens-Hardy M.R. recognized that the process in *Bailey's Case* (1) of dividing by 50 and subtracting from the quotient $\frac{1}{26}$ or $\frac{2}{52}$ and the process of the county court judge in the *Anslow Case* (2) of subtracting $\frac{16}{52}$, made the calculation equivalent to a division in the first instance by 52. Accordingly, this case decides that the divisor must be always the actual number of weeks in the prescribed statutory period. It is the only divisor once the rate of wages is obtained. But the fraction is extremely instructive. The $\frac{£66}{33} = £2$ is the rate of wages simply. The 36 is the number of normal weeks, the 52 the statutory number for which the average has to be taken. This, therefore, demonstrates conclusively my main proposition that the *actual earnings* under this rule do not enter into the computation at all. It is the rate of wages multiplied by the *possible* number of weeks in the employment divided by 52, $\frac{£2 \times 36}{52}$. In other words, that is the amount he might possibly have earned, not what he actually earned.

This proposition, which could not have arisen in *Bailey's Case* (1) as he worked full time, was not disputed by the employer in the *Anslow Case* (2).

Let us see what this case would have decided if this two weeks' illness and one week's absence were out of it. The fraction is $\frac{36}{52} \times \frac{66}{33}$. We may transpose it $\frac{66}{52} \times \frac{36}{33}$. If the man had worked the thirty-six, this would have been $\frac{66}{52} \times \frac{36}{36} = \frac{66}{52}$, or the simple average of the total earnings divided by the total number of weeks, though no work had been done during sixteen weeks. This shows that any elaborate system of taking the normal week average and deducting a fraction to correct the error is simply a disguise for taking the simple average in the ordinary way. The real point of difference is dividing the 52, not into the actual, but into the possible earnings. The earnings for the three weeks would have been $£2 \times 3 = £6$. Add this to $£66 = £72$. $\frac{£72}{52}$ is the

(1) [1908] 1 K. B. 441.

(2) [1909] 1 K. B. 352.

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common average. Now take the fractions: $\frac{66}{33} \times \frac{36}{52} = \frac{72}{52}$, the same thing. The question of the addition of the £6 was not argued or disputed. Leave that out, and it is the average in *Lysons' Case* (1), taking the whole fifty-two weeks one week with another.

I should add that Cozens-Hardy M.R. says: "I have not thus far referred to the decision of this Court in *Bailey* v. *Kenworthy* (2), but I think the present appeal is really concluded by that decision. This precise point is dealt with by Fletcher Moulton L.J., and although in my judgment I referred only to the true divisor, that was because the figures were agreed between the parties, and not because of any difference of opinion." (This I find difficult to follow, as Fletcher Moulton L.J. gave his judgment after the Master of the Rolls, and the parties had not settled then.) He then says that he desires to add that he agrees with a comment of the Lord President on that part of the head-note to *Bailey* v. *Kenworthy* (2), which states that "days in which no work is done, and no wages are earned, are to be disregarded," is expressed in too general terms. But in his own judgment in *Bailey's Case*, at p. 454, he says: "Days during which no work was done ought not to be taken into account in arriving at the average wage." And in the judgment itself in the *Anslow Case* (3), on the preceding page (p. 355), he says: "I think that days in which no work is done must be disregarded for the purposes of the division of the total wages earned," thus in terms apparently repeating the words of the marginal note which was said to require correction. What the correction is has nowhere been stated. I think the correction is the deduction of this fraction, which is equivalent to saying that the entire statutory period must be the divisor, whether work was done or not.

The applicant appealed to the House of Lords (4). Again, the only question raised was the deduction of the $\frac{16}{52}$, the counsel for the appellant saying (p. 437), "It is agreed on both sides that no deduction is to be made for voluntary absences, and thus a premium is offered to idleness." The respondent's counsel were not called on. Lord Loreburn, who alone gave a judgment, said:

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(1) [1901] A. C. 79.
(2) [1908] 1 K. B. 441.
(3) [1909] 1 K. B. 352.
(4) [1909] A. C. 435.

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"The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of work was fourteen weeks' stoppage and two weeks of general holidays during the year." That was the question, and the only question. The answer was the fraction. It was in such a case $\frac{£66}{52} \times \frac{36}{36} = \frac{£66}{52}$; that is, the total earnings divided by the 52 weeks, and that is all that arose for decision, or was argued or decided in the Court of Appeal or House of Lords.

However, Lord Loreburn did not confine himself to the question before the House, as stated by himself with his usual accuracy. Having stated the question as above, he says:—(A) "The object of the Act broadly stated is to compensate a man for his loss of capacity to earn." (B) "Which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident." (C) "If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn." (D) "So, too, if there be a casualty accidentally stopping the work." (E) "But if it is part of the employment to stop for a month in each year, then he cannot earn wages in that time in the employment, and his capacity to earn is less over the year." (F) "I agree with what the learned Master of the Rolls says in his judgment, when he uses the following language:—'In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked.'" The other Lords concurred in the dismissal of the appeal, but gave no judgments.

Now, apply this to a fatal case under sect. 1 (*a*)—(A) The object is to compensate the dependents for what they lost. This is what he did earn, not what he would have earned if he were a different man. (B) The measure is "a sum equal to his earnings" during the period, actual or hypothetical. (C), (D) But it diminishes his earnings *pro tanto*. (E) This diminishes his earnings equally. (F) This only defines the rate of wages. So that the passage is wholly inapplicable to the present case. As

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to B and C, they were the subject of the admission in both Courts. They are pure dicta. Further, it will be observed that they only mean adding the wages for three weeks. Two of the weeks were illness; this is put on the same footing as holidays. (D) did not arise at all, even in the admission. It is an adoption of the dictum of Fletcher Moulton L.J. in *Bailey's Case.* (E) Is the ratio decidendi the subtraction of the $\frac{16}{52}$. (F) Is the ascertainment simply of the rate of wages.

To come back to the fraction, $\frac{£66}{33} \times \frac{36}{52}$. The $\frac{£66}{33}$ is only the ascertainment of the normal week's wages. When you get the £2, there is an end of it. If the wages were £2 by the week, you would not want it. When you get the £2, one way or the other, the £66 and the 33 disappear, and £2 × $\frac{36}{52}$ only, or $\frac{£72}{52}$, remains; this is, as I have shown, adding the three weeks' wages, £6, to the actual £60.

This shows the absolute correctness of Lord Loreburn's description of the fraction as admitted by the respondents in both courts. But it shows, as his judgment shows, that in ascertaining the average weekly earnings, once you get the rate of wages, (*a*) the number of weeks the man has worked, and (*b*) the amount he has actually earned during the 52 weeks, are not taken into account at all. The only factors are £2, the rate of wages; 36, the number of weeks during which they could be earned; and 52 weeks.

It may be asked why did the employers' counsel only raise the question of the deduction of the $\frac{16}{52}$, and not the illness. The $\frac{16}{52} = \frac{4}{13}$ reduced the compensation by nearly one-third. On the £68 it reduced the average earnings from £2 1s. 4d. to £1 8*s.* 2*d.* On the other hand, the three weeks only increased the average earnings by three weeks' wages, £6, divided by 52, about two shillings and one penny. It was not worth running any risk of costs for this.

I must now refer to a case decided some years later, also a case of injury not death—the case of *White* v. *Wiseman* (1).

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(1) [1912] 3 K. B. 352.

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It is of vital importance. The wages for part of the year were £1 per week, but for the rest on piece-work. The total earnings were £51 8*s.* 5½*d.*, which made the rate of wages nearly £1 per week. They varied, however, from 10*s.* 7*d.* to £1 7*s.* 0*d.* per week. This was caused by the fact that there was no work for the man to do owing to slackness of trade. The period during which he had no work was fixed at six weeks. The county court judge held that he ought to discard these weeks (*i.e.* from the divisor). This is of course adding the amount which would have been earned to the £51 8*s.* 5*d.* There were three weeks' normal holidays, but these of course were immaterial. It was agreed that if the judge was right, then the compensation should be 12*s.* per week, *i.e.*, one-half the average weekly earnings. If they were not to be discarded, 10s. per week, *i.e.*, half the £1 per week, or *the actual earnings* divided by 52. The Court held the latter to be the true view. Just as in *Perry* v. *Wright* (1) and the *Anslow Case* (2) there was no question of actual and possible earnings, as the man took all the work he got. He, therefore, had no merits on the grounds of either drink or idleness for being credited with money which he had not earned. He was simply a decent man who took all the work he could get. If he had not worked the six weeks through drink or idleness, he would, under the dicta in *Perry* v. *Wright* (1) and the *Anslow Case* (2), have been entitled to have had full wages for these weeks credited to him; but as it was, because the work was not there for him, he was not. They were not possible earnings in the employment.

The Court held that he was only entitled to the 10*s.* per week. The only cases cited were *Perry* v. *Wright* (1) and the *Anslow Case* (2). Cozens-Hardy M.R. says, "Happily we have not to do here with any interruption due to illness" (p. 355). This would seem to show that he did not regard the *Anslow Case* (2) as having settled this, though two of the three weeks were on this account. At p. 356 he says, "On what principle ought the average weekly earnings over the twelve months to be arrived at? 'Average,' if it means anything, means something between what you may consider due to overtime and to short time, and the average is to be ascertained, as every other average under such circumstances in such cases, by adding them up together and taking the mean." (This of course means dividing the total by the 52 weeks.) He goes on to say that the county court judge thought that he must disregard the weeks in which the work was slack, and that we must have regard to the weeks in which it was brisk, and adds, "That seems to me inconsistent with the very meaning of the words 'average weekly earnings,' . . . and I think that it is inconsistent with the decision of this Court, and with at least one decision of this Court approved by the House of Lords. The judgments in *Perry* v. *Wright* (1) really conclude this case. It is an incident of this employment that the man who was never discharged from work *should get in some weeks more and in some weeks less pay, having regard to the state of trade* and other circumstances. *In my opinion all that we can do is to take the bad with the good and add them together, and divide them.* We are not here troubled with the precise amount of the divisor. It is question of principle whether these wages are to be calculated on one footing of 24*s.*, or on the other of 20*s.*" Of course, the average being 20*s.*, the divisor was 52. If it had been 24*s.*, the total wages should have been increased in proportion, and then also divided by 52. This has been fully shown by the fraction. This would practically bring out 24*s.* The other judges concurred.

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(1) [1908] 1 K. B. 441. (2) [1909] A. C. 434.

Now this judgment really would seem to be, in the passages which I have marked in italics, almost the language of one who had just read the judgment of Lord Halsbury in *Lysons' Case* (2). It deals with "average weekly earnings," and that only. "The rate of remuneration at the date of the accident," and the confusion caused by this unhappy phrase, have entirely vanished. This case seems to me conclusive of the present; the period here is twenty-six, not fifty-two; the total earnings are £23. There is no evidence of work lost through drink, idleness, or illness to entitle the applicant to have any addition made to the total earnings. There is no evidence of any accident stopping the work.

In *White* v. *Wiseman* (3) the judge found that the absence of work was due to fortuitous circumstances. The Court found that

(1) [1908] 1 K. B. 441. (2) [1901] A. C. 79. (3) [1912] 3 K. B. 352.

there was no evidence to justify this. The only difference is that in that case it is stated as a fact that the low earnings were due to the fact that the employer had not work for the man. There is no evidence here that it was caused by anything else. I think that if a party alleges that he is entitled to credit, as earnings, for money which it is proved he did not earn, it lies on him to give the evidence necessary to establish his right to this. The applicant has given no evidence of work lost through drink, idleness, or sickness. He must rest under the imputation of being a sober, decent, industrious man ready to do the normal work in his employment. Under the circumstances I think on any view of the law the applicant is not entitled to more than the sum paid into Court.

Even assuming that the effect of the authorities is that "average weekly earnings during the period" means "weekly rate of wages in the employment during the period," and that the actual earnings of the workmen in the case are to be wholly disregarded (save to ascertain the rate of wages where same are not fixed), or, what is the same thing in other words, that earnings mean possible not actual earnings, I think there is no evidence in this case that the applicant did not earn all that was to be earned during the period.

In the next place, I have not been referred to any case in which this proposition of law has been argued or decided, and I know of no case binding this Court to hold that this proposition is law.

In the next place, even assuming that the proposition has been established as to cases under Schedule I, s. (1), (*b*), I am of opinion that there are vital distinctions between sect. 1 (*a*) and sect. 1 (*b*) of the First Schedule, and the application of this principle to them. (1) Sect. 1 (*a*) gives no discretion; it fixes the measure of compensation by a specific calculation. Where the figures are ascertainable, it is a question of arithmetic. Sect. 1 (*b*) only fixes maxima; it leaves absolute discretion within the maxima, and thus the fair and proper sum under all the circumstances can be given. (2) The object of sect. 1 (*b*) is to give a weekly payment to a living man. The object of sect. 1 (*a*) is to compensate the dependants for what they have lost, i.e. what they got from the man, his actual earnings, not what he could have earned if a more industrious man. (3) In sect. 1 (*b*) the construction applies equally to the man who has served the full period (twelve months) and the man who has served the less period. The absurd irregularities which I have shown in sect. 1 (*a*) between the three years' service and the lesser period are wholly absent. (4) There is no "statutory fiction" or "deeming" clause in sect. 1 (*b*). If the observations of Fletcher Moulton L.J., at p. 460, of *Perry* v. *Wright* (1) mean that in considering the true construction of the "deeming" clause or statutory fiction in s. 1 (*a*) the entire section and its objects are not to be considered, I respectfully decline to accept this, as it flatly contradicts the principles laid down by Lord Justice James and adopted by Lord Cairns and the House of Lords in such cases.

I think I am at liberty to hold that "earnings" throughout sect. 1 (*a*) must have the same meaning, namely, "actual earnings," and that the words "average weekly earnings" in that section mean "the weekly average of his earnings" in the same service, and that there is nothing to overrule the statement of the law by Lord Halsbury and the other Lords in *Lysons' Case* and *Stuart* v. *Nixon & Bruce* (2) that this is so. I think on this ground that the county court judge proceeded on a principle not justified by law.

In the next place, I think that even if the dicta apply, *White* v. *Wiseman* (3) shows that in the present case he was equally wrong.

I think, on the whole case, that the only thing the judge was entitled to do was to add the weeks' earnings (good and bad) together and divide the amount by 26 and multiply the quotient by 156. The result would be considerably less than the £150 lodged. I therefore think the decision should be that the applicant was not entitled to any greater sum, and that the appeal should be allowed with costs.

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(1) [1908] 1 K. B. 441.
(2) [1901] A. C. 79.
(3) [1912] 3 K. B. 352.

Molony L.J. :—

It is admitted that the workman died as a result of the injury, and that his family were wholly dependent upon his earnings, and the only question which arises is as to the proper sum to be paid for compensation.

Under the Act the amount is to be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of these sums is the larger, but not exceeding in any case £300.

If the workman had been three years in the employment, there would be no difficulty in estimating the amount; but in the present case the workman had only been employed for six months, and the Act then provides that in such case the amount of the workman's earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer.

Rule 2 (*a*) of the Schedule provides that the average weekly earnings shall be computed in such a manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where, by reason of the shortness of the time during which the workman had been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer.

In the present case the learned county court judge had before him the pay-sheet of the workman for the whole term of his employment, and no further evidence of any kind. The pay-sheets showed that the deceased had worked for twenty-six weeks, and received £22 19*s.* 5*d.*, or an average of 17*s.* 8*d.* per week. The county court judge did not take the average weekly earnings during the period of his actual employment as they appeared from the pay-sheet, and he fixed the average weekly earnings at a larger sum, viz. £1 0*s.* 7*d.*

The cases of *Perry* v. *Wright* (1) and *Greenwood* v. *Nall* (2) conclusively establish that where a person has been employed for three years, although absent on many occasions through ill-health, the sum payable for compensation is his actual earnings during the preceding three years. In the present case the county court judge was of opinion that the period of employment was sufficiently long to enable actual weekly earnings to be calculated, and it is, therefore, not necessary to consider the effect of the proviso in Rule 2 (*a*) of the Schedule.

There is no difficulty in estimating the earnings for a period of twenty-six weeks. In *Godden* v. *Cowlin* (3) the average weekly earnings for a period of nine weeks were taken.

In *Barnett* v. *Port of London Authority* (4) the workman had worked only twelve days, and the judge calculated the compensation on the actual earnings for the first completed week.

There is no evidence that the deceased was ever prevented from working by stoppages which were recognized incidents of the employment, and no explanation is given as to why the deceased did not work full time. In the absence of such evidence there is nothing which would justify the learned judge in disregarding the actual average weekly earnings of the workman: *White* v. *Wiseman* (5).

I regret that I am unable to agree with the Master of the Rolls in his analysis of the pay-sheets. I do not feel myself at liberty to speculate, where I have been unable to find legal evidence.

I am of opinion that there is no evidence to sustain the finding of the learned judge that the average earnings of the deceased amounted to £1 0*s.* 7½*d.* weekly, and consequently I think that the sum of £150 lodged in Court was sufficient, and that the appeal should be allowed.

Solicitor for Messrs. Grainger Bros.: *Edward A. Shaw.*

Solicitor for the applicants: *J. J. Macken.*

J. G. T.

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(1) [1908] 1 K. B. 441.
(2) [1915] 3 K. B. 97.
(3) [1913] 1 K. B. 690.
(4) [1913] 2 K. B. 115.
(5) [1912] 3 K. B. 352.

THE KING (LETTERKENNY RURAL DISTRICT COUNCIL) *v.* REGAN.

K. B. Div.
1915.
Oct. 29.
Appeal.
1916.
Feb. 21.

Justices—Small Debts Act (22 *Vict. c.* 14), *s.* 5—*Rent—Decree—Distress Warrant—Execution of by Police—Constabulary* (*Ireland*) *Act*, 1836 (6 *&* 7 *Wm.* 4, *c.* 13), *s.* 15—*Petty Sessions* (*Ireland*) *Act*, 1851 (14 *&* 15 *Vict. c.* 93), *s.* 25.

Where a decree for rent is obtained under the Small Debts Act (22 Vict. c. 14), and the warrant is addressed to the constabulary, the latter are bound to execute the warrant, notwithstanding the provisions of sect. 15 of the Constabulary (Ireland) Act, 1836, prohibiting the constabulary from levying rents by distress.

So held by the Court of Appeal, affirming the decision of the King's Bench Division.

Rex (*Whiteside*) v. *Justices of Belfast*, 46 I. L. T. R. 88, followed.

Mandamus.

At a petty sessions held at Letterkenny, Co. Donegal, on the 8th of October, 1914, the Rural District Council of Letterkenny obtained a decree under the provisions of the Small Debts Act (22 Vict. c. 14), for the recovery of the sum of 18*s.*, together with 5*s.* costs of said decree, due to them by one Thomas Patton for the use and occupation of a labourer's cottage held by him as a weekly tenant under the council; and the justices, at the request of the solicitor for the council, addressed the warrant for execution to the defendant herein, the District Inspector, Royal Irish Constabulary, Letterkenny.

On the 6th May, 1915, the Letterkenny Rural District Council obtained a decree from the justices for the recovery of £1 5*s.* and costs, due to them by James O'Donnell for the use and occupation of a labourer's cottage held by him as a weekly tenant under the council, and the warrant was addressed for execution to the defendant herein.

The defendant returned both warrants to the justices, stating that he was advised that in view of the provisions of 6 Wm. 4

REX (LETTERKENNY RURAL DISTRICT COUNCIL) *v.* REGAN.

c. 13, sect. 15 (1), it would not be legal for the police to execute distress warrants for the non-payment of rent.

On the application of the prosecutors a conditional order was obtained for a writ of mandamus directed to the defendant, commanding him, according to the provisions of 14 & 15 Vict. c. 93, sect. 25 (2), to execute the warrants in question. The present motion was on behalf of the Crown to discharge the conditional order.

The Solicitor-General (*James O'Connor K.C.*) and *Alan Gordon*, for the Crown.

Wylie K.C., and *A. E. Wood*, for the prosecutor.

CHERRY L.C.J. :—

This is a case of some importance, but inasmuch as we have formed a clear opinion upon it we do not think it necessary to reserve judgment.

It is a motion by the Crown to discharge a conditional order for mandamus directed to the respondent, a District Inspector of the Royal Irish Constabulary, commanding him to execute warrants addressed to him under decrees obtained by the Letterkenny Rural District Council under the Small Debts Act for the recovery of rent. Under that Act (22 Vict. c. 14, sect. 5) justices at petty sessions are empowered to hear and determine cases for the recovery of debts not exceeding two pounds.

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(1) Constabulary (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 13), s. 15: "And be it enacted that every chief constable, head constable, constable, and sub-constable to be appointed under this Act shall . . . attend the justices of the peace at their several general or quarter sessions, and also at their petty sessions . . . and shall obey and execute all the lawful warrants, orders, and commands of such justices at such sessions in all cases, civil and criminal: Provided always, that no chief or other constable or sub-constable shall be employed under such authority to levy tithes or tithe composition, or to levy rents by distress . . ."

(2) Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 25: "The persons to whom warrants shall be addressed for execution shall be as follows:— 1. All warrants in proceedings as to offences punishable either by indictment or upon summary conviction which shall be issued in any petty sessions district, shall be addressed to the sub-inspector or head constable of constabulary who shall act for the place where the petty sessions of such district shall be held. 2. All warrants in other cases shall be addressed either to the sub-inspector or head constable of constabulary in manner aforesaid, or to such other person or persons (not being the complainant or a party interested) as the justices issuing the same shall see fit."

It has been decided in the *Queen* (*Jones*) v. *Barry* (1) that the proper mode of executing decrees under the Small Debts Act is that prescribed by the Petty Sessions (Ireland) Act, 1851. Section 25 of the latter statute provides, first, that all warrants in proceedings as to offences punishable either by indictment or upon summary conviction shall be addressed to the police authorities, and in the next place it provides that all warrants in other cases, including all cases of civil jurisdiction, "shall be addressed either to the sub-inspector or head constable of constabulary, or to such other person or persons (not being the complainant or a party interested) as the justices issuing the same shall see fit." If that sub-section stood alone, it would clearly be within the competence of the justices to direct warrants in all civil cases to be addressed to the constabulary for execution.

The constabulary refused to execute the warrants addressed to them in this case, upon the ground that they were relieved from the duty to do so by the Constabulary (Ireland) Act, 1836, 6 & 7 Wm. 4, c. 13, sect. 15. [His Lordship read the section.] The contention on behalf of the Crown is that the words in the proviso, "No chief or other constable or sub-constable shall be employed under such authority . . . to levy rents by distress," render it unlawful to address warrants issued under decrees for the recovery of rent to the police for execution. The contention on the other side is that the words "to levy rents by distress" refer only to the well-known process of recovery of rent by distress, that is, seizure of goods upon the demised premises without the previous judgment or order of any court.

It is obvious that the general purpose and intention of the section was to keep the constabulary clear of all cases where there might be a doubt about the existence of the debt, and consequently where high feeling might exist as to its enforcement. There is no good reason for extending it to execution by ordinary process of law after a decree or judgment has been pronounced by a court of competent jurisdiction. It has been argued on behalf of the Crown that the reference to distress in the section applies to the warrant of distress obtained under a decree at petty sessions as well as to ordinary distress, and in support of that contention the Solicitor-General refers to the Petty Sessions (Ireland) Act, 1851, especially sect. 22, in which the word "distress" is used as applying to the seizure of goods for the purpose of satisfying a decree or order previously made by the justices. Counsel for the Crown have also referred us to the form of warrant prescribed in the Schedule to the Act in which form the word "distress" is used in the same sense.

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(1) 23 I. L. T R. 28.

It must not be forgotten, however, that at the time the Constabulary (Ireland) Act, 1836, was passed, magistrates at petty sessions had no civil jurisdiction, and that the proviso in sect. 15 did not and could not at that time refer to a civil process before the magistrates for the recovery of rent. The words "to levy rents by distress" could, therefore, have referred only to distress in the ordinary signification of the term, and I cannot understand how that interpretation could be altered by a subsequent statute giving jurisdiction to justices in connexion with the recovery of small debts generally, even though these might include rent.

The words of the Constabulary Act plainly indicate the levying of distress without any prior legal process, and do not in my opinion apply to the form of execution contemplated by sect. 25 of the Petty Sessions (Ireland) Act, 1851. It is the duty of the constabulary to execute warrants issued under that section and to levy execution for rent as well as for other debts if they are selected by the magistrates to do so.

We think, therefore, that the motion by the Crown to discharge the conditional order ought to be refused.

Madden J.:—

I have nothing to add to the judgment delivered by the Lord Chief Justice.

C. L.

Appeal.
1916.

REX (LETTERKENNY RURAL DISTRICT COUNCIL) *v.* REGAN.

The Crown appealed to the Court of Appeal (1).

The Solicitor-General (*James O'Connor K.C.*) and *Cusack*, for the appellants:—

The contention of the Crown is that this case comes within the exception in sect. 15 of the Constabulary Act, 1836, providing that no constable shall be employed under the authority of magistrates to levy tithes or tithe composition, "or to levy rents by distress." At the date of this statute there was in force a provision (8 Geo. 1, c. 2, s. 8 (Ir.)) under which constables could be required under the warrant of a justice of the peace to assist in distraining for rent in the cases mentioned in the section. We suggest that it was the intention of the Legislature, in order to prevent friction between the constabulary and the public, to free the constabulary from the duty of executing warrants to levy decrees for rent by distress. *Whiteside's Case* (2), which decided that an order obtained under the Small Debts Act is enforceable under the Petty Sessions (Ireland) Act, 1851, and that the warrant may be addressed to the police, does not apply to a case where the decree is for rent. We submit that, if the case comes within the exception in sect. 15, it is immaterial that there is a technical merger of the debt for rent in the decree, as decided in *Wrench* v. *Rourke* (3).

[They also referred to *Atthill* v. *Woods* (4).]

Wylie, K.C. (*A. E. Wood* with him), for the respondents:—

Once it is admitted that rent can be sued for under the Small Debts Act, *Whiteside's Case* (2) applies, and the police are bound to execute the warrant. *Wrench* v. *Rourke* (3) decides that the debt is merged in the decree, and accordingly the execution of the warrant by the police is not a levying of rent by distress within sect. 15 of the Constabulary Act, 1836, but is merely execution of the decree under the Small Debts Act.

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(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ.

(2) 46 I. L. T. R. 88.

(3) 3 New Ir. Jur. Rep. 50.

(4) [1903] 2 I. R. 305.

SIR IGNATIUS J. O'BRIEN L.C.:—

We think that the order of the Court below was right. As I understand, an order was obtained under the Small Debts Act for a sum due in respect of rent, which was within the limitations of that statute, namely, £2. *Whiteside's Case* (1) decided, beyond all question, that when an order is obtained under the Small Debts Act, it is enforceable under the provisions of the Petty Sessions (Ireland) Act, 1851, and the warrant must be addressed to the police, or to such other person, not being the complainant or a party interested, as the justices shall see fit. The justices may, accordingly, if they think fit, address the warrant to the police.

The question raised here is—Is the police constable bound to execute it? It is contended that on the true construction of sect. 15 of the Constabulary Act, 1836, he is not bound to do so. That section, after enacting that constables shall attend magistrates at sessions, and execute their warrants, provides "that no chief or other constable or sub-constable shall be employed under such authority to levy tithes or tithe composition, or to levy rents by distress." . . . It is contended that this was a rent debt originally, and that as it was, in a sense, recoverable by distress, the case comes within the proviso in sect. 15, and that *Whiteside's Case* (1) must be modified to this extent, that while the decision applies to all other debts recoverable under the Small Debts Act, and decrees therefor enforceable under the provisions of the Petty Sessions Act, it does not apply to such a case as this, and the police are not bound to execute the warrant. It is not for me to consider what the motives of the Legislature were in imposing this duty on the constabulary, or whether such duty was calculated to produce friction between the police and the public or not. The law, as laid down in *Whiteside's Case* (1), is binding on me, and that decision applies primâ facie to every debt recoverable under the Small Debts Act.

Now, it was decided by the King's Bench Division in *Wrench* v. *Rourke* (2) that the effect of a decree for a debt at petty sessions

(1) 46 I. L. T. R. 88.

(2) 3 New Ir. Jur. Rep. 50.

was to merge the debt in the decree, and that the balance of the decree remaining unpaid could not be recovered by means of a process on the original debt. That being the position of the authorities, it is clear, in my judgment, that by no possible construction could the enforcement of the decree in the present case by the process of distress under the Petty Sessions Act be regarded as a levy of rent by distress within the exception in sect. 15 of the Constabulary Act. An additional argument, which, if it were necessary to rely on it, would be conclusive, is furnished by the fact which the Solicitor-General has placed before us, that there was at the time of the passing of the Act of 1836, and still is, upon the statute book a curious provision contained in sect. 8 of 8 Geo. 1, c. 2 (Ir.). That section is as follows: — "Whereas distresses lawfully taken are frequently rescued, be it further enacted . . . That if any distress lawfully taken for rent, or services, or other legal dues, shall be rescued, if the person on whose behalf such distress was taken, his agent or bailiff, or any person employed in taking such distress, shall within fourteen days after such rescue make oath thereof before any of His Majesty's justices of the peace of the county, where such rescue shall have been committed, . . . then such justice shall by warrant under his hand and seal order and require one or more constable or constables of the said county to go with and assist the person on whose behalf such distress was taken, or his agent or bailiff, or the person employed by him as aforesaid, or the person making such oath, to distrain again for the said rent, services, or other legal dues, and to take with him a number of persons, sufficient to secure and convey the distress so by him or them to be taken to some lawful pound." That enactment forms a clear exception from the words "to levy rents by distress" in the proviso to sect. 15 of the Constabulary Act of 1836, and is conclusive in favour of the view taken by the King's Bench Division.

The appeal must accordingly be dismissed with costs.

Ronan and Molony L.JJ. concurred.

Solicitors for the prosecutors: *E. McFadden & Co.*
Solicitor for the Crown: *The Chief Crown Solicitor.*

R. ST. J. C.

K. B. Div.
1915.
Dec. 15, 16, 21.

Appeal.
1916.
June 1, 2, 5, 9, 25.

P. *v.* P. (BY AMENDMENT M'D. *v.* P.).

Nullity of Marriage—Impotence of Husband—Decree of Nullity—Marriage void ab initio—*Right of Wife to recover Money paid in Consideration of Marriage—Money spent by Husband—Money applied by Husband to pay off Charge on his Lands—Merger—Right of Wife to stand in shoes of Chargeant paid off.*

Where a decree of nullity of marriage is pronounced by the Court on the ground of the impotence of one of the parties, the marriage is null and void *ab initio.*

Prior to, and in contemplation of, an intended marriage between the plaintiff, then M. M'D. (the intended wife), and the defendant, T. P. (the intended husband), a sum of £475 was paid by the plaintiff to the defendant as her marriage portion, and it was agreed that £400 of this sum should be applied in paying off a charge of that amount on the defendant's lands. A ceremony of marriage subsequently took place between the plaintiff and the defendant. Shortly after the ceremony the defendant paid off the charge of £400 out of the £475. The balance of that sum was spent by him while the plaintiff and defendant were living together. Some years after the ceremony the plaintiff presented a petition to the King's Bench Division (Matrimonial) asking for a declaration of nullity of marriage on the ground of the impotence of the defendant. She subsequently issued the writ in the present action, describing herself as M. P. and a married woman, and claiming to recover the sum of £475 as money received by the defendant for her use, a claim being subsequently added that the plaintiff was entitled to a charge on the defendant's lands for £400. After the issue of the writ, but before the action came on for trial, an order was made by the King's Bench Division declaring that the form of marriage "was and is null and void," on the ground of the impotence of the defendant. The plaintiff then, by leave of the Court, amended the writ of summons by describing herself as M. M'D. and a spinster.

Held, by the Court of Appeal, affirming the decision of the King's Bench Division, that the plaintiff was entitled, as upon a consideration that had failed, to be repaid by the defendant the sum of £400, and was entitled to stand in the place of the chargeant whose charge upon the defendant's lands had been paid off, and that the plaintiff had a good charge on the said lands for this sum of £400.

Held also, that as the effect of the decree of nullity was to make the marriage void *ab initio*, the plaintiff was to be treated as having been a *feme sole* at the date of the issue of the writ, and that the amendment of the writ was properly allowed.

Held, by the King's Bench Division, that as regarded the sum of £75 paid to and expended by the defendant while the plaintiff lived with him as his wife, this was a concluded transaction which ought not to be disturbed.

Motion for judgment or a new trial.

On the 17th February, 1909, the plaintiff, then Mary Anne M'D ——, had gone through a ceremony of marriage with the defendant, Timothy P ——. On the 13th January, 1915, the plaintiff presented a petition to the King's Bench Division (Matrimonial) praying to have the marriage annulled on the ground of the impotence of the defendant. The writ in the present action was issued by the plaintiff on the 2nd February, 1915, and in it she was described as Mary Anne P ——, and a married woman. The claim endorsed on the writ was for the sum of £475, being moneys paid to and received by the defendant for the use of, and on behalf of, the plaintiff.

On the 11th May, 1915, a decree was pronounced by the King's Bench Division (Matrimonial) in the following terms:—

"The judge being of opinion that it was needful in the administration of justice that the evidence in this cause should be taken in camera, and having taken the oral evidence of the witnesses produced on behalf of the said petitioner . . . and on behalf of the said respondent, and having heard counsel thereon on behalf of the said petitioner and the said respondent, found:— 1. That at the date of the ceremony of marriage between the petitioner and respondent, the respondent was, and still is, incapable of the act of generation. 2. That said incapacity cannot be removed or cured by art or skill. 3. That the petitioner is a virgin. 4. That at the date aforesaid she had not and still has not any impediment on her part to the consummation of the marriage. And thereupon the judge in open Court by his final decree pronounced and adjudged that the form of marriage between the petitioner and the said Timothy P —— was and is null and void, and that the petitioner (Mary Anne P ——, otherwise M'D ——) is free from all bond of marriage with the said respondent (Timothy P ——)."

On the 2nd June, 1915, the writ of summons in the present

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1915.
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action was, by leave of the Court, amended by describing the plaintiff as Mary Anne M'D——, and a spinster. On the same day a statement of claim was delivered, which set out:—1. That in the month of February, 1909, an agreement was entered into between the plaintiff and the defendant, whereby the plaintiff, at the request of the defendant, agreed to marry the defendant, the said marriage to be binding and effectual and capable of consummation, and in consideration of the said marriage the plaintiff agreed to pay to the defendant the sum of £475 as her marriage portion. 2. That the defendant, on the 17th February, 1909, went through a ceremony of marriage with the plaintiff in fulfilment of the said agreement, and immediately prior to the ceremony and in pursuance of the agreement mentioned in paragraph 1, the plaintiff caused to be paid to the defendant, out of the plaintiff's moneys, the sum of £375 in cash, and in the month of August, 1910, the plaintiff caused to be paid to the defendant the further sum of £100, out of the plaintiff's moneys, making in all £475, in accordance with the agreement mentioned in paragraph 1 of the statement of claim. 3. That on the 11th May, 1915, by a decree pronounced in a suit instituted against the defendant by the plaintiff, entitled "In the High Court of Justice in Ireland, King's Bench Division (Matrimonial)," between Mary Anne M'D —— (falsely called P ——), petitioner, and Timothy P ——, respondent, the said ceremony of marriage mentioned in paragraph 2 was declared null and void on the ground of impotence on the part of the defendant, and his incapacity to consummate the same. By paragraph 4 the plaintiff claimed payment of the said sum of £475 as money received by the defendant for the use of the plaintiff.

The defendant delivered a defence which, in addition to formal traverses of the averments in the statement of claim, and a plea of the Statute of Frauds, set out, as further and alternative defences, that, admitting for the purposes of such defences that the defendant did receive the said sum of £475, he gave good and valuable consideration to the plaintiff therefor; that the giving to and actual receipt by him of the said sum constituted in law a good and valid gift of the same; that the said sum was agreed to be paid to the defendant in consideration of the celebration between the plaintiff and the defendant of a lawful marriage, and that the marriage was a lawful marriage, and the plaintiff became upon the time of the celebration of the said marriage the lawful wife of the defendant, and continued so down to the 11th May, 1915, the date when the decree in the matrimonial cause was pronounced; that the marriage between the plaintiff and defendant was not a void marriage, but a marriage voidable at the election of the plaintiff; that the sums of £375 and £100 were paid to the defendant by the plaintiff absolutely, without reserving any estate, right, or interest therein for the plaintiff. Paragraph 11 alleged that the sum of £100 paid by the plaintiff to the defendant in the month of August, 1910, was paid over to the defendant absolutely by the plaintiff, although the plaintiff at the said date alleged that the marriage between the plaintiff and the defendant had not been consummated. Paragraph 12 was as follows:—"The defendant further says that, prior to the date of the marriage between the plaintiff and defendant, the plaintiff was informed by the defendant that the defendant's sister was, under the will of the defendant's father, entitled to a charge of £400 as her portion upon the farms of the defendant, and upon the treaty for the marriage between the plaintiff and defendant it was agreed between the plaintiff and defendant that the said portion of £400 payable to the defendant's sister should be paid to the defendant's sister, and discharged out of the said sum of £475, the plaintiff's marriage portion, and the said portion of £400 was, with the knowledge of the plaintiff, in pursuance of the said agreement, paid by the defendant to the defendant's sister out of the said respective sums of £375 and £100, when the same were paid by the plaintiff to the defendant."

The plaintiff in her reply joined issue on the defence, and further pleaded, in reply to paragraph 11, that at the time of the payment of the said sum of £100 she did not know that the defendant was incapable of consummating the marriage; and in reply to paragraph 12 she denied that the sum of £400 was to her knowledge paid to the defendant's sister out of the said sums of £375 and £100, and that if so applied it was not in pursuance of any agreement to which the plaintiff was a party. She further submitted that the allegations in the said paragraph furnished no defence to the plaintiff's claim.

The action was tried before Kenny J., without a jury, at Clonmel Assizes, on the 7th July, 1915. The material portion of the plaintiff's evidence was as follows:—"My father died several years before my marriage. I resided with my brother in February, 1909. I had two married sisters. I had not known the defendant when the marriage was arranged. I met him first a couple of days before the marriage. My brother and brother-in-law negotiated the marriage. Defendant resided six miles away. I had never got any part of my father's estate up to my marriage. It was then agreed that my share was to be £475. I agreed to marry defendant, and to give him my fortune of £475. There was nothing whatever said about his sister. I heard nothing whatever said about his sister. I heard nothing whatever about any provision being made for his sister. Before the ceremony I only met him twice. On the 17th February, 1909, we went through a ceremony of marriage. I have never got back any of the £475. £375 was paid to the defendant by my brother on my behalf a couple of days before the marriage, and a promissory note given by my brother for £100. I did not know he was impotent in the full sense while I lived with him. It was not a gift apart from my marriage. His mother and sister were living in the house and continued so to live." On cross-examination she admitted that her brother told her he had read the will of the defendant's father, and might have told her of the £400 for the defendant's sister. She stated that before the marriage the defendant handed her back £10, and that some money was spent on the wedding trip.

The plaintiff's brother was examined, and stated that he and one Richard F—— and a cousin (since deceased) made the arrangement for the marriage; "£475 was agreed to be paid on behalf of my sister to defendant—£375 in cash and £100 in twelve months' time. Two or three days before the marriage he came over and was introduced, and I paid him the £375, and on the 17th February gave my promissory note, dated the 17th February, 1909, for £100. In or about August, 1910, I paid the amount of the note." He denied that he had made any arrangement that the defendant's sister was to get £400 out of the money, though he admitted that he knew she was to get £400 under her father's will. (It appeared from this will that the testator had charged certain lands devised by him to the defendant with a sum of £400 payable to the defendant's sister.) On cross-examination he stated that before he paid the promissory note he knew of his sister's complaints which culminated in the Divorce Court.

Richard F——, a brother-in-law of the plaintiff's, was examined, and stated that he took part in the negotiations, and that there was not a word said about paying a penny to defendant's sister.

For the defence the defendant was examined, and stated that when he came home with the £375 he gave his sister £300 on account of her £400, and applied the balance to his own purposes; and that when he got the £100 he gave it to his sister as the rest of her fortune, and got a receipt for it which he produced. He stated that his wife knew that he was paying this balance of £100. The defendant's sister was examined, and stated that she was paid the £300 a few days before the wedding, and that she put it in the bank and afterwards invested it in certain shares of public companies; and that when in August, 1910, her brother paid her the balance of the £400 she invested it also.

Kenny J. gave judgment for the defendant with costs, holding:—(1) That the plaintiff and her advisers knew of the £400 charge, and that it was arranged that it was to be paid out of the plaintiff's dowry of £475. (2) That the £400 was paid out of the plaintiff's dowry of £475. (3) That the defendant's sister invested the amount in the shares of public companies as deposed to by her. (4) That when the writ was issued the plaintiff was not in a position to maintain this action.

The plaintiff applied to the King's Bench Division for an order that the findings and judgment of Kenny J. in favour of the defendant should be set aside, and that judgment should be entered for the plaintiff for £475 with costs, or alternatively for £75 with costs, or alternatively for a new trial.

Sergeant Sullivan K.C., *Gibson K.C.*, and *Swayne*, for the plaintiff.

Samuels K.C., and *Cooper*, for the defendant.

The arguments were similar to those in the Court of Appeal, reported *post*, p. 414.

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During the argument in the King's Bench Division an order was made, dated the 16th December, 1915, giving the plaintiff leave to amend the writ of summons by claiming a declaration "that the plaintiff is entitled to a charge on defendant's lands for £400"; and to amend the statement of claim by pleading therein, "The plaintiff invested £400 of the said sum of £475 in paying off a charge of £400 upon the following lands the property of the defendant [the description of the lands was set out], which payment was made by the defendant to his sister Mary P——, who was entitled to said charge under the will of her father, Edward P——, deceased, dated . . . The plaintiff claims to follow the said moneys, and to stand in the shoes of the said Mary P——, and to be entitled to said charge of £400 so paid off, with her money as aforesaid." It was further ordered that any defence to the said amendment, open upon the evidence, should be taken as having been pleaded by the defendant. Also that the plaintiff should be at liberty to register the action as a *lis pendens* against the lands mentioned.

Dec. 21.

MADDEN J.:—

The plaintiff's claim to relief in this action arises under the following circumstances:—On the 17th of February, 1909, a marriage was solemnized between her and the defendant, and they lived together for several years. On the 13th of January, 1915, the plaintiff presented a petition to this Court to have this marriage annulled on the ground of the impotency of the defendant, and on the 11th of May, 1915, the form of marriage between the plaintiff and the defendant was declared to be null and void, and a divorce a vinculo was granted to the plaintiff.

It was proved at the trial that the plaintiff's fortune was the sum of £475 provided by her brother, and that this sum was paid to the defendant in anticipation and in consideration of the intended marriage. The sum of £400, portion of this £475, was applied by the defendant in paying off a charge of £400, affecting the farm of which he was owner, which had been created by the will of his father. The defendant says that he applied the balance of the sum of £475 to his own purposes, including, of course, the maintenance of the house in which he and the plaintiff were living together up to the time at which she had taken proceedings to have the marriage declared void.

In the present action the wife, having obtained a divorce a vinculo on the ground that no valid marriage was ever contracted, seeks to recover from the husband money advanced to him in anticipation, and in consideration, of a marriage which did not take place.

The right of the wife to recover her dower under such circumstances has been recognized from an early period.

In 1 Dyer's Reports, 13*a*, we find a case to the following effect: A man gives certain goods with his daughter to one in marriage, and then they are divorced; the question was whether the wife should have the goods back. It was held reasonable that she should have them, for the goods were given in advancement of her marriage, and *cessante causa cessat effectus.* "So that the wife shall have back the goods not spent."

The proposition laid down in the case reported in Dyer was applied by Sir John Bigham, when President of the Probate and Matrimonial Division, in *Joseph* v. *Joseph* (1). There a sum of money, the dowry of an intended wife, was handed to the intended husband, and, in accordance with a custom in the Jewish community, lodged in a bank in their joint names. An application for return of dower was made to the Court. It was treated as akin to an application for variation of settlements. The matter was referred to the registrar. He found that, upon the facts proved, a sum of £400, handed to the husband and lodged in the joint names of husband and wife, should be paid to the petitioner, the wife, for her sole and absolute property; and the President confirmed the report of the registrar, and made an order in accordance with it. The material facts were that this £400 was the dowry of the wife, and that it had been advanced on her behalf in contemplation of the intended marriage. Two cheques for £25 each were handed to the husband on the day of the wedding, and the registrar accepted the husband's evidence that the money was advanced for, and spent in, the expenses of the honeymoon.

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(1) [1909] P. 217.

It is said that no precedent can be found in the books of an action at law for the recovery of the wife's dowry after a decree of divorce a vinculo, and also, that no jurisdiction such as that exercised by Sir J. Bigham in *Joseph* v. *Joseph* (1) is vested in any Irish Court.

In order to deal with these questions it is necessary to trace the devolution of the jurisdiction in matrimonial matters, from the Ecclesiastical tribunals to the existing courts in England and in Ireland.

The Ecclesiastical Courts in England, when granting a divorce a vinculo, exercised a jurisdiction over the husband's property to the extent of ordering restitution of the wife's dowry. In the clear and concise statement of the law contained in 2 Bright's Husband and Wife, p. 364, the writer, after pointing out that dispositions of property may hold good after divorce, says of the wife, "as for the rest, which consists of money, she shall sue in the Spiritual Courts, and prohibition does not lie." The principle on which a suit for return of dower was cognisable in the Ecclesiastical Courts is thus stated in 3 Burns's Ecclesiastical Law, p. 389: "Where the principal matter belonged to the cognizance of the Spiritual Court, all matters incidental (though otherwise of a temporal nature) are also cognizable there, and no prohibition will lie, provided they proceed in the trial of such temporal incidents according to the rules of the temporal law." The principal matter was the divorce a vinculo; the restitution of the wife's dower was a temporal matter incidental thereto, and so long as the courts proceeded on the principle of the common law as laid down in the case reported in Dyer, no prohibition would be granted. When the divorced wife could obtain relief in the Ecclesiastical Court, it was not necessary for her to bring an action at law for the recovery of her dower. But the right to bring such an action has been clearly recognized. The case reported in Dyer was an action at common law. In 2 Bright's Husband and Wife, page 365, it is stated that the divorced wife can recover in an action of detinue property alienated under the collusive pretence of gift while husband and wife were living together.

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(1) [1909] P. 217.

The jurisdiction of the Ecclesiastical Courts in cases of nullity of marriage was vested in the Court of Divorce and Matrimonial Causes established in England by 20 & 21 Vict. c. 85. By an amending Act, 22 & 23 Vict. c. 61, certain provisions as regards property and rectification of settlements, which were by the principal Act vested in the Court, were extended to cases of nullity. Under the 5th section the Court has power, after a final decree of nullity of marriage, to inquire into the existence of ante-nuptial or post-nuptial settlements, and to make such order with reference to the application of the settled property for the benefit of the parties interested as to the Court shall seem meet. It was under this statute that Sir J. Bingham, giving to the word "settlement" a meaning which would include the disposition of the wife's property in the present case, made the order in the case of *Joseph* v. *Joseph* (1). This statutable jurisdiction was in substitution for that exercised by the Ecclesiastical tribunals, and this consideration narrows the period of time during which a wife would be compelled to proceed at law for restitution of dower to two years.

Although this Court does not possess the special statutory jurisdiction conferred on the English Court for Divorce and Matrimonial Causes, the legal principles upon which Sir J. Bigham acted in *Joseph* v. *Joseph* (1) are equally applicable to an action at law for return of dower, where money was paid to a husband in anticipation of a marriage which did not take place. These principles are, that the woman is entitled to a return of property which can be shown to represent her dower, and that the Court will not open up concluded matters which took place when husband and wife were living together, such as expenditure upon the expense of a honeymoon; principles both of which appear to be plainly applicable to the present case.

In Ireland the jurisdiction of the Ecclesiastical Courts in matrimonial matters, including suits of nullity of marriage, was, after the disestablishment of the Irish Church, vested in the Court created by the Matrimonial Causes (Ireland) Act, 1870. The jurisdiction so transferred is now vested in this Court. By the 13th section it was enacted that the Court was to proceed on principles and rules which should be as nearly as possible conformable to the principles and rules on which the Ecclesiastical Courts had acted. I am not in a position to state whether the Ecclesiastical Courts in Ireland at any time entertained an application by a wife who had obtained a divorce a vinculo for restitution of dower. But it is clear that no such jurisdiction is exercisable by this Court in a matrimonial suit. No such legislation as that contained in 22 & 23 Vict. c. 61, was passed for Ireland, and the wife's right can only be enforced by a suitable proceeding in the High Court of Justice.

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(1) [1909] P. 217.

I now proceed to consider the grounds of defence to this action on which Mr. Samuels relies. The marriage in the present case was not absolutely void, as in the case of a marriage void on the ground of consanguinity. When an essential condition of marriage is absent by reason of the incompetence of one of the parties, the person aggrieved may obtain a decree declaring the form of marriage which was entered into to be null and void. The plaintiff, if she had thought fit, "might," in the words of Sir J. Hannen, "have remained a wife enjoying all the advantages of a wife, save that of marital intercourse": *Turner* v. *Thompson* (1). But the marriage being voidable at her option, the decree obtained by her is declaratory of the fact that no marriage ever took place. The decree in a case of nullity does not dissolve an existing marriage on the ground of facts which have come into existence after the contract was entered into, such as the adultery of the wife. Power to decree a divorce a vinculo on ground such as this was conferred on the English Matrimonial Court by the statute of 1857. The decree in the present case declares the form of marriage between the parties to be a nullity on the ground of facts existing when it was entered into, and a thing declared to be a nullity cannot constitute valuable consideration for a disposition of property; *ex nihilo nihil fit.*

In support of the proposition that a voidable marriage followed by cohabitation can constitute a good consideration for an antenuptial disposition of property, Mr. Samuels relies on the cases of *Dunbar* v. *Dunbar* (2) and *Turner* v. *Thompson* (1). The former

(1) 13 P. D. 37.

(2) [1909] 2 Ch. 639.

of these cases, *Dunbar* v. *Dunbar* (1), is a case in which it was held that a completed and executed transaction effected while the parties live together is unaffected by a subsequent divorce. The husband purchased a house under circumstances which would raise a presumption that it was intended as an advancement for his wife. The wife obtained a divorce in a suit of nullity of marriage. In a suit subsequently instituted by the wife, Warrington J. held that the doctrine of advancement applied. At the time of the purchase "they were living together, and there was nothing whatever that I can see to lead the Court to suppose that the presumed intention in this case was different from the presumed intention in any other cases where a purchase is made in the name of the wife."

In *Turner* v. *Thompson* (2) the question was one of domicil. The marriage was a voidable one, and was ultimately annulled on the ground of the incompetence of the husband. The wife was by origin a British subject. After the marriage she went to America and lived there with her husband, and was domiciled in the United States. It was held by Sir J. Hannen that she had taken up the domicil of her husband. "She had the intention of taking up her permanent abode with him, and of making his country her permanent home."

These cases are illustrations and applications of the settled principle that things executed and concluded while the parties live together have effect after divorce, and will not be disturbed. They do not assist the defendant's case further than as regards the sum of £75, expended while the parties were living together. They afford no defence as regards the charge of £400, by which the wife's money, paid to the defendant in anticipation of marriage, is now represented. With respect to a divorce a vinculo, it is laid down in Brooke that things executed, where the husband is seised in right of the wife, shall not be avoided by divorce, as "waste, receipt of rent, seisin of ward, presentment to a benefice, gifts of goods of the wife." Mr. Samuels suggested that the payment off of the sister's charge might, under these words, hold good as a gift of the wife's money. These words plainly apply to a gift after marriage. The payment of the sister's charge was not a gift of the wife's goods, but an application of her money in contemplation of a marriage.

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(1) [1909] 2 Ch. 639.

(2) 13 P. D. 37.

This action, in its original form, was for the recovery of £475, money received by the defendant for the use of the plaintiff. As the case proceeded it became apparent that the form of action which was applicable to the facts of the case, as proved in evidence, was an application to the equitable jurisdiction which is now vested in this Court for a declaration that the plaintiff is entitled to stand in the place of the defendant's sister in regard to the charge of £400, which was paid by means of money which was the plaintiff's property, and which she is legally entitled to recover from the defendant. The statement of claim has been amended accordingly, and Mr. Samuels is to be taken as having pleaded to the amended statement of claim any defence which the facts of the case would sustain.

If a valid marriage had taken place, the titles to this money, and to the farm on which it was charged, would have been united in the defendant, and in that state of facts, in the absence of evidence to the contrary, it would be presumed that the charge had been paid off with the intention of merging it in the interest in his farm, inasmuch as, on this assumption, the defendant was the owner of both. In such a case the equitable presumption of merger is founded on the absence of the interest in keeping the charge alive such as would exist where an incumbrance is paid off by the owner of a limited interest in the land charged. To act upon this presumption as against an interest which has arisen in consequence of the failure of the owner of the land to effect the consideration for which he obtained the money to pay off the charge, would be, in my opinion, contrary to the first principles of equity. The money by which the charge was paid off, and the charge in which it was invested, became on the dissolution of the marriage the property of the plaintiff, as the £400 which, in the case of *Joseph* v. *Joseph* (1), was invested in the joint names of husband and wife, became the property of the wife, and there is as little difficulty in pursuing the money so invested under the

(1) [1909] P. 217.

equitable jurisdiction vested in this Court as there was in that case under the statutable powers conferred on the English Court.

The judgment dissolving the marriage was given on the 11th May, 1915. The writ in this action was issued on the 2nd February, obviously to prevent a defence founded on the Statute of Limitations. The plaintiff's case is that she was a feme sole at the date of the issuing of the writ. When the case came on for trial, she was in a position to prove this, for the decree which she obtained is conclusive evidence against the world that she never was a feme covert. The plaintiff is, in my opinion, entitled to judgment for the sum of £400, and also to a declaration that she is entitled to stand in the place of the owner of the charge of £400 paid off by her money, and that the said charge is a good and valid charge as against the interest of the defendant in the farm.

As regards the sum of £75, paid to and expended by the defendant while the plaintiff lived with him as his wife, this is a concluded transaction, which ought not now to be disturbed.

BOYD and DODD JJ. concurred.

C. L.

An order was made by the King's Bench Division on the 21st December, 1915, ordering the defendant to pay the plaintiff the said sum of £400 without interest up to the date of the order, but with interest at 4 per cent. per annum from that date until payment, and declaring that the plaintiff was entitled to stand in the place of the defendant's sister with respect to the charge of £400 upon the defendant's lands which had been paid off by the £400 portion of the plaintiff's marriage dowry, and that the said sum of £400 with interest at 4 per cent. per annum was well charged on the said lands. A stay of execution was put on the order in the event of the defendant bringing into court the said sum of £400 within a fortnight and serving notice of appeal. The £400 was duly brought into court by the defendant.

Appeal.
1916.
P. *v.* P.

The defendant appealed to the Court of Appeal against the orders of the 16th December, 1915, and 21st December, 1915 (1).

Samuels K.C. and *Cooper*, for the appellant:—

The marriage here was voidable only and not void, and the gift to the husband is good notwithstanding the subsequent decree of nullity. Impotence does not render a marriage void but only voidable: *A.* v. *B.* (2); *Turner* v. *Thompson* (3); *Dormer* v. *Ward* (4); *Cavell* v. *Price* (5); *Dunbar* v. *Dunbar* (6); *Napier* v. *Napier* (7); *Morriss and Webber's Case* (8). This distinction is not a mere refinement, but expresses a real difference in substance: *A.* v. *B.* (2) *per* Sir J. P. Wilde, at p. 561. Such a marriage cannot be impeached on the ground of nullity after the death of one of the parties: *Elliott* v. *Gurr* (9); *A.* v. *B.* (2). It may be approbated as well as reprobated, and will not be declared void where the party seeking relief has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her to treat as if no such relation had existed: *G.* v. *M.* (10), *per* Lord Selborne (p. 186). And the marriage will not be declared void where there has been unreasonable delay in instituting the suit: *Lewis* v. *Hayward* (11), *per* Lord Chelmsford L.C., at p. 108.

The transfer of the money here was intended to be an absolute one; everything was executed, and there was no continuing or future trusts of either capital or income. Things executed before the decree of nullity will not be disturbed. In *Hubbard* v. *Hubbard* (12) there had been an assignment of a house by the husband to a trustee for the wife. She afterwards obtained a decree of nullity, and it was held that the assignment was not a settlement which could be varied under sect. 5 of the Matrimonial Causes Act, which gave power to the courts in England to vary

(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ.

(2) L. R. 1 P. D. 559.

(3) 13 P. D. 37.

(4) [1901] P. 20.

(5) L. R. 1 Ex. 246.

(6) [1909] 2 Ch. 639.

(7) [1915] P. 184.

(8) 2 Leon. 169.

(9) 2 Phillim. 16.

(10) 10 A. C. 171.

(11) 35 L. J. Prob. 105.

(12) [1901] P. 157.

settlements after a decree of nullity. In a case decided in Victoria by the full Court, referred to in 53 Sol. J., p. 94, it was held that when a settlement had been made upon marriage, and the marriage was subsequently declared void on the ground of the husband's impotence, the settlor was not entitled to consider the settlement at an end.

In cases of this kind there is not such a total failure of consideration as entitles the wife to recover back the money. The right of consortium, the right of support, the right to pledge the husband's credit for necessaries, are also part of the consideration. The statement of Lord FitzGerald in *G.* v. *M.* (1), at p. 204, that an essential term of the contract of marriage is the capacity for consummation, is too wide. It would invalidate all marriages between persons of advanced years. There is no presumption that when a ceremony of marriage takes place the marriage shall continue. The ceremony here was a valid one, and the consideration for handing over the money was complete. The presumption of advancement in favour of a wife has been held to prevail, notwithstanding a subsequent decree of nullity: *Dunbar* v. *Dunbar* (2); *M'Naught* v. *M'Naught* (3).

Even if the plaintiff were otherwise entitled to recover the money, the fact that the defendant has disposed of it and that it is no longer in his hands, deprives her of such right. Only the goods not spent or disposed of can be recovered: Year Books, 26 H. 8, p. 7, B. 1; 1 Dyer, 13 (*a*); Br. Ab. pl. 10; pl. 17; Bright on Husband and Wife, vol. ii, p. 364. As regards the £400 applied in paying off the charge, it is now merged in the inheritance of the lands and extinguished.

There was no cause of action when the writ was issued. The plaintiff then had the status of a married woman, and the action was brought by her as such. The amendment of the 2nd June, 1915, should not have been allowed, as it amounted to setting up a new cause of action altogether.

[They also referred to:—*Ayerst* v. *Jenkins* (4); *Chaplin* v. *Bradley* (5); Swinburne on Espousals, p. 229.]

(1) 10 A. C. 171.
(2) [1909] 2 Ch. 639.
(3) 54 Sol. J. 135.
(4) L. R. 16 Eq. 275.
(5) 33 Beav. 61.

Appeal.
1916.
P. *v.* P.

Serjeant Sullivan K.C. and *Gibson* K.C. (with them *Swayne*), for the respondent:—

The consideration for the money paid by the plaintiff was a valid marriage, and there was no such marriage here. The contract of marriage contains by implication, as an essential term, the capacity for consummation: *G.* v. *M.* (1), *per* Lord FitzGerald, at p. 204. There was, therefore, a total failure of consideration, and the plaintiff is entitled to recover back the money. A decree of nullity is a declaration that there has been no marriage at all; that it was void *ab initio.* The decree in the present case declares that the form of marriage between the petitioner and the respondent "was and is null and void." By sect. 13 of the Matrimonial Causes (Ireland) Act, 1870, the Court is to proceed and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted. The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all: *Napier* v. *Napier* (2), *per* Lord Cozens-Hardy M.R., at p. 186. The word "voidable" when used as it is in some of the cases in reference to a marriage of this kind, is not used in its ordinary sense. It merely means that until there has been a declaration of nullity by a competent court, the apparent marriage cannot, for reasons of public policy, be treated as void. It can never be avoided by third parties, and even the parties to it may lose the right to have a declaration of nullity by having, with a knowledge of the facts and the law, approbated the marriage, or by reason of delay in applying for relief. But the refusal of the Court to make a declaration of nullity where there has been approbation or delay is not on the ground that the parties are well married, but on the ground of a personal equity against the party applying for relief: *G.* v. *M.* (1), *per* Lord Selborne L.C., at p. 186; *Lewis* v. *Hayward* (3), *per* Lord Chelmsford L.C., at p. 108. In Ayliffe's Parergon Juris Canonici, speaking of a divorce a vinculo matrimonii (which corresponds to a decree for nullity at the present day, since such divorce could have been granted only where there had been no valid marriage), the author says (p. 229):—"In all those cases where such a divorce was, the marriage was not de jure, according to the canonists, because it was void *ab initio.* For where the incapacity arises from any matter precedent to the marriage, there the marriage is only de facto; and a sentence of divorce in such case is only declamatory, that the marriage is dissolved, for it was absolutely void before, and either of the parties might marry again, though the other was living." The same author, referring to divorce on the ground of impotence, says (p. 227) that "if both the parties consent to live together, the man may retain her as his sister, though not as his wife."

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(1) 10 A. C. 171.
(2) [1915] P. 184.
(3) 35 L. J. Prob. 105.

In *In re Boddington* (1) a testator left an annuity to his wife so long as she should continue his widow. After the date of the will the marriage was declared void by a decree of the Probate and Matrimonial Division, and it was held that the late wife was not entitled to the annuity, as having never been in law the wife of the testator she never could be his widow.

The decree of nullity, when pronounced, relates back to the ceremony of marriage, and is conclusive proof that there never was a valid marriage. Thus it has been held to bastardize a child en ventre sa mere when the decree was pronounced: *Perry* v. *Meddowcroft* (2); and children born before the decree: *The Queen* v. *Inhabitants of Wye* (3). In 1 Dyer, 13 *a*, it is stated that when a man gives goods with his daughter to one in marriage, and then they are divorced (referring to a divorce a vinculo, which could at that time be granted only where there was no marriage), it seemed reasonable that she should have them "inasmuch as the cause and consideration of the gift is defeated." The subsequent statement that the wife shall have back the goods "not spent," means goods gone beyond recovery. In 2 Dyer, 147 *b*, par. 76, it is said:—"Also land given to a woman in marriage, or in frank-marriage, by any of her ancestors, is given at the time of the marriage, or before or after, but the marriage is the cause, and it shall be in advancement of the woman: and if they are divorced, the wife, that was the cause of the gift, shall have back the whole land." [They also referred to *Murray* v. *Mann* (4).]

(1) 22 Ch. D. 597.

(2) 10 Beav. 122.

(3) 3 N. & P. 6.

(4) 2 Ex. 538.

The defendant received the money as a trustee. The £400 was applied in paying off the charge on the defendant's lands, and the plaintiff is in equity entitled to stand in the shoes of the chargeant who was paid off.

Samuels K.C., in reply:—

The cases cited as to the relation back of the decree so as to bastardize the issue do not apply here. In *Perry* v. *Meddowcroft* (1), the decree was granted on the ground that there had been no valid marriage ceremony. In *The Queen* v. *Inhabitants of Wye* (2), the parties were within the prohibited degrees, and such marriages were declared by 32 H. 8, c. 38, to be contrary to God's law. See *Brook* v. *Brook* (3). [He also referred to *Civil Service Co-operative Society* v. *General Steam Navigation Company* (4); Reeves's History of English Law, vol. iii, p. 66.]

Cur. adv. vult.

June 9.

Sir Ignatius J. O'Brien L.C.:—

This action, in its original form before amendment, was an action for money had and received by the defendant for the use of the plaintiff, an equitable cause of action long known in our common law Courts, and the proper form when it is sought to recover money paid under a contract where there has been a failure of consideration. I abstain for the moment from using the expression "total failure of consideration," because I wish afterwards to develop, as briefly as I can, what my view of the present action is with regard to the point, so strongly pressed by counsel for the respondent, that there must be a total failure of consideration; that this was a case in which there was not a total failure of consideration; and that consequently the action did not lie.

The defence, in substance, to the action is one which, to the layman at least, would appear somewhat startling. The defendant agreed to marry the plaintiff, and the ceremony of marriage took place; but it appears that owing to the impotency of the defendant it was a form of marriage only, and that it was and is null and void. It had been agreed that a sum of £475, the bride's portion, should be paid to the defendant, and accordingly the sum of £375 was paid to the defendant on behalf of the plaintiff a couple of days before the marriage, and the balance secured by a promissory note for £100 payable twelve months after that date given to the defendant by the plaintiff's brother on the day of the marriage. That note was paid when it matured, and, as far as I can see, payment could not have been successfully resisted. No decree of nullity had at the time been made. For all practical purposes, therefore, the transaction may be considered in the simple light of a payment by the plaintiff to the defendant of a sum of £475 as her marriage portion in respect of a marriage which was null and void. That money paid under these circumstances should not be recoverable would, I think, startle one not acquainted with the intricacies of the law. That a woman who had parted with her entire fortune to a man who had represented, innocently no doubt, that he was capable of entering into a valid marriage with her, should lose that fortune because an empty ceremony had been gone through by the parties, would, as I have said, appear startling to a layman; but of course whatever the law is, be it ever so harsh, it must prevail, and we have heard a most learned and interesting discussion of authorities, beginning with the Year Books and coming down to the year 1915, which it is contended compel us to hold that the law is not in harmony with what I conceive to be good reason and common sense—to hold that, there having been no marriage, this man is entitled to keep this money, and this poor woman is to remain dowerless.

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(1) 10 Beav. 122.
(2) 3 N. & P. 6.
(3) 9 H. L. C. 193.
(4) [1903] 2 K. B. 756.

When the action was instituted—and this constitutes the only difficulty I have in the case—there had been no decree of the Court declaring that the marriage was null and void, and the writ was issued on the 2nd February, 1915, by the plaintiff in what would have been her married name if there had been a marriage. A petition for a declaration of nullity had been presented prior to the issue of the writ, namely, on the 13th January, 1915, and a decree of nullity was pronounced on the 11th May, 1915, so that, of course, the action was commenced before the decree of nullity. On the 2nd June, 1915, the plaintiff obtained an order to amend the proceedings by suing on the basis that she was an unmarried woman. The necessity for proceeding by amendment instead of instituting a new action appears to have arisen from the view—which I do not say was not well founded—that the Statute of Limitations might have barred the right to recover the money unless time was prevented from running by the existence of a valid writ, issued prior to the expiration of six years from the date of the marriage. It might be that the statute did not, in the circumstances of this case, begin to run from that date; but counsel on behalf of the plaintiff were not willing to take any risk, and they obtained this order to amend the proceedings, which were amended accordingly. In this state of facts the whole question of the status of this woman from the date of the marriage ceremony has to be considered, and I shall deal as briefly as possible with the argument which was addressed to us on this subject by Mr. Samuels and Mr. Cooper—an argument to which I cannot accede.

In addition to the count for money had and received, an amended claim was put forward, suggested by paragraph 12 of the statement of defence, and at the suggestion, as I understand, of the Court below, which has to be considered, having regard to the form of the order of the King's Bench Division. Paragraph 12 of the original statement of defence is as follows:—"The defendant further says that, prior to the date of the marriage between the plaintiff and defendant, the plaintiff was informed by the defendant that the defendant's sister was, under the will of defendant's father, entitled to a charge of £400 as her portion upon the farms of the defendant, and upon the treaty for the marriage between the plaintiff and the defendant it was agreed between the plaintiff and defendant that the said portion of £400 payable to defendant's sister should be paid to the defendant's sister and discharged out of the said sum of £475, the plaintiff's marriage portion, and the said portion of £400 was, with the knowledge of the plaintiff, in pursuance of the said agreement, paid by the defendant to the defendant's sister out of the said respective sums of £375 and £100, when the same were paid by the plaintiff to the defendant."

It is undoubtedly true that £400 of this sum of £475 was applied to discharge this incumbrance on the defendant's farm, and from the time at which it was discharged he was entitled to hold the farm free from the charge, so far as his sister was concerned. Accordingly, by the amended claim, another view of the case was presented, namely, that £400 of the plaintiff's fortune having been applied in paying off this charge on the defendant's lands, she was entitled to stand in the shoes of the defendant's sister, and was entitled to the charge of £400 so paid off with her money.

Mr. Justice Kenny in his report states: "I gave judgment for the defendant with costs, holding (1) That the plaintiff and her advisers knew of the £400 charge, and that it was arranged that it was to be paid out of the plaintiff's dowry of £475; (2) That the £400 was paid out of the plaintiff's dowry of £475; (3) That the defendant's sister invested the amount in the shares of public companies as deposed by her; (4) That when the writ was issued the plaintiff was not in a position to maintain this action." The main thing, however, is that he has found as a fact—and I think that the evidence fully justified his finding—that by arrangement before the marriage this sum of £400 was to be applied in paying off this charge. To my mind the plaintiff's case, so far from being weakened, is if anything strengthened, by reason of the fact that although the defendant had not retained the money on, let us say deposit receipts in a bank, he had applied it for his own benefit in releasing his farm from a money claim, thereby enabling him to work his land more profitably.

I do not attach any importance to the early cases in the Year Books and in Dyer, with which we were so strongly pressed, but it is interesting to know that even so many centuries ago the consciences of our Courts enabled a woman who was deprived of property, under similar circumstances to those existing here, to get it back if the marriage was annulled; and after all these centuries I cannot think that there has been a retrogression from the principle of doing justice in such cases. But while, as I conceive, there is no doubt that once a decree of the Court declares a marriage of this kind to be null and void, it was and is void *ab initio*, yet difficulties arose as time went on with regard to the position of persons who had entered into such a marriage contract. As was put in the course of the argument, it is not an uncommon case that two very old people go through a form of marriage, knowing well that a true marriage cannot take place. Again, a woman may take large benefits under this supposed marriage, and may have allowed ten, twenty, or thirty years to have elapsed without making any complaint, in which case, having, in the words of Lord Selborne in the case of *G.* v. *M.* (1), approbated the marriage, to allow her to reprobate it in proceedings for a decree of nullity would not be in accordance with the public interest, nor in most cases with common justice.

The result was that in describing a marriage of this kind a certain confusion arose in the use of the words "void" and "voidable." In the case *A* v. *A sued as B* (2) the President of the Probate and Matrimonial Division, Warren J., says: "According to the law administered in this Court, the fact of impotency makes the marriage ceremony voidable (*Bury's Case* (3); *A* v. *B* (4); *W.* v. *R.* (5)), and not void; and it was argued that a man cannot avoid this voidable contract by reason of his own infirmity." The expressions "void" and "voidable," when used with regard to ordinary contracts, have a well-settled meaning, but when applied, as Mr. Samuels sought to apply them in the present case, to marriage contracts, their use leads to confusion and to the obscuring of the real position of affairs.

The position of a marriage of this kind is shortly and clearly stated by Lord Cranworth in *Lewis* v. *Hayward* (6). He says:—"As we are to make a precedent in this case, I should rather recommend your Lordships not only to reverse the decree which has been made, but to decree that the marriage was absolutely null and void *ab initio.*" The Court below in that case had dismissed the petition for nullity. The minute of the order made by the House of Lords was, that it was ordered and adjudged that the decree made in the Court for Divorce and Matrimonial Causes be reversed, "and it is declared that the said marriage celebrated between the respondent John Edward Hayward and the appellant was null and void *ab initio.*"

I do not know when the present form of decree was introduced.

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(1) 10 A. C. 171, at p. 186.
(2) 19 L. R. Ir. 403, 413.
(3) 5 Rep. 99.
(4) L. R. 1 P. & D. 559.
(5) 1 P. D. 559.
(6) 35 L. J. (N. S.) Prob. 105.

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The form of decree in use in Ireland, down to at any rate the year 1887, is set out in *A* v. *A sued as B* (1), at p. 418. It states that the judge having taken the evidence and heard counsel on behalf of the petitioner and respondent, "by his final decree pronounced and declared that the marriage in fact had and solemnized on the 30th January, 1884, at the church of, &c. between the petitioner and the respondent was and is absolutely null and void to all intents and purposes in the law whatsoever, by reason of the incurable impotency of the said——, the petitioner, and that the said petitioner was and is free from all bond of marriage with the said respondent." The order in the present case is slightly different in form, but in substance it is the same. It recites that the judge found that at the date of the ceremony of marriage the respondent was and still is incapable of the act of generation; that the incapacity could not be cured; that the petitioner was a virgin, and that there was no impediment on her part to the consummation of the marriage; and proceeds:—"And thereupon the judge in open Court by his final decree pronounced and adjudged that the form of marriage between the petitioner and the said Timothy P—— was and is null and void, and that the petitioner Mary Anne P——, otherwise Mary Anne M'D——, is free from all bond of marriage with the said respondent." It carefully describes it as a form of marriage. A form it was, and nothing but a form. As a marriage, from the moment the decree was pronounced it was void *ab initio.*

We were pressed with the argument that as in some of the cases a marriage of this kind has been described as voidable and not void, the principles applicable to ordinary contracts which are voidable at the will of one of the parties apply. It is clear that Courts and text-writers have found great difficulty in describing exactly the position of such a marriage in language applicable to ordinary contracts. In the case of *G.* v. *M.* (2), so strongly relied on by Mr. Samuels, Lord Selborne speaks of a marriage of this kind being approbated or reprobated. Of course the doctrine of approbation or reprobation depends on the contract having some validity. If it is absolutely void—as, for instance, amounting to a contract to commit a crime—it can neither be approbated nor reprobated. But Lord Selborne's meaning is clear. Having referred to what was described as the doctrine of "sincerity," he proceeds (p. 186) :—"I think I can perceive that the real basis of reasoning which underlies that phraseology is this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well, now, that explanation can be referred to known principles of equitable and, I may say, of general jurisprudence."

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(1) 19 L. R. Ir. 403, 413

(2) 10 A. C. 171.

Once there has been a ceremony of marriage, prima facie the marriage is good. If a person who has gone through that ceremony chooses to come to the Court to have it declared that there never was a marriage, the Court will consider the conduct of the person seeking its aid, and may, on general equitable principles, refuse to permit such person to obtain a decree of nullity. That, of course, recognizes that, so far as the public are concerned, it is presumed to be a good marriage until set aside, and that, as between the parties, one of them may not be able to have it set aside by reason of the conduct of such party adopting and taking advantages under it. But once the Court considers that the party seeking relief has not done anything which prevents him or her obtaining the relief sought, and the impotency of the other party is proved, it pronounces a decree declaring the marriage to be a form only, and to be absolutely null and void at the time it purported to be effected, and from that time on.

The latest case in which the difficulty of expressing the view of the Court on this question of void or voidable was felt is *Napier* v. *Napier* (1). Pickford L.J., after referring to the passage from Ayliffe's Parergon Juris Canonici, p. 229, which was cited

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(1) [1915] P. 184.

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at the Bar here, and to a passage from Burns's Ecclesiastical Law, says (p. 189):—"This may seem hardly consistent logically with the doctrine also held by these Courts that marriages under these circumstances were only voidable. See Shelford on Marriage and Divorce (p. 484):—'The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities' (referring to suits for nullity on the ground of impotence) 'only make the marriage voidable, and not ipso facto void until sentence of nullity be obtained'; but this inconsistency, if any, does not alter the law that to obtain such sentence there must have been a disability existing at the time of the marriage." He appreciates the difficulty, and text-writers have also appreciated the difficulty; but it is a difficulty of expression, not of substance.

It being well settled that once the decree is pronounced the marriage is void *ab initio*, and was never anything but a form, let us put to ourselves the question, Did this woman pay her fortune of £475 for a form? It is obvious that she did not; that she paid it for a marriage. In the words of Lord FitzGerald in *G.* v. *M.* (1), at p. 204, "The contract contains by implication, as an essential term, the capacity for consummation." Of course in the case of old people deliberately entering into a contract of marriage, knowing the marriage never could be consummated, the Court might refuse relief, on the principle referred to in the judgment of Lord Selborne; but once the Court grants the relief, there is no further question.

When one comes to deal with what might, in one sense, be called a collateral matter, namely the contract with respect to the woman's fortune, it is difficult to say that the money was paid, not for a real marriage that would be consummated, but for a ceremony which was null and void. Even if this were a contract to which the technical rules applicable to ordinary contracts which are voidable and not void applied, I should be of opinion that there was a total failure of consideration, because the consideration cannot be split up. The real consideration, the essential term of the contract, was a marriage; and when the husband cannot fulfil the condition of the contract, are Courts to set themselves the absurd task, as it seems to me, of determining how much of the fortune was paid for mere consortium or or food and clothing? To me it seems that, in commonplace language, the woman paid her money for a marriage capable of being consummated; it cannot be consummated, and therefore there was a total failure of consideration. When we have a decree of the Court declaring this marriage null and void, is the law in this ludicrous condition, that there is to be an inquiry before a chief clerk or a master to ascertain how much of this £475 was paid for one consideration, and how much for another, when every man and every woman knows that there could be only one answer, that it was paid for what Lord FitzGerald calls the essential term of the contract?

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(1) 10 A. C. 171.

Is there to be an account taken of the value of the dresses and the food supplied by this man to this woman while they were living together? Even upon this narrow view, there would be consideration given by her for these matters, since she gave her services and managed his house. She gave quite as much as he gave. I absolutely decline to consider as a serious proposition that she is not, under these circumstances, entitled to get back every half-penny of this money.

This answers the general question of the right of the plaintiff under circumstances like the present to recover in an action of indebitatus assumpsit her fortune which has been paid for a consideration which never really existed. But there is a point which at one time caused me some difficulty, but which is, I think, answered when we bear in mind that once the decree of nullity is pronounced the marriage is void from the date of the ceremony. When the plaintiff instituted the action, she had of course entered into this de facto marriage. She accordingly described herself in the writ of summons as Mary Anne P—— and as being a married woman. She continued to be such so far as the records of the court are concerned down to the pronouncing of the decree of nullity in May, 1915. But once that decree was pronounced, no matter by what name she described herself in the writ, she was Mary Anne M'D——, and an unmarried woman. The describing herself by a false name would not deprive the Court of the right to amend the record, but it is contended that because she occupied the status of a married woman down to the date of the pronouncing of the decree of nullity, or rather to the date of the order giving liberty to amend, and after that order occupied a different status, the amendment should not have been allowed, as it was turning one cause of action into another. In my opinion that contention cannot be acceded to. At the time the plaintiff brought this action, describing herself as Mary Anne P——, as the marriage was void *ab initio*, she was in fact and in truth Mary Anne M'D——, a feme sole. Once the decree of nullity was pronounced, it operated in such a manner on her status that she was rightly treated by the Court as being an unmarried woman at the date of issuing the writ. She continued such throughout all the proceedings. She was the same party throughout and her rights were the same. Our procedure since the Judicature Act is supposed to be free from mere technicalities arising from misdescription. Accordingly, I am of opinion that this ground of objection must also fail.

I now come to the form of the order which was made by the King's Bench Division, as to which I had also up to a certain time some difficulty. The King's Bench Division has made an order declaring that in respect of the £400, the portion of the plaintiff's fortune applied by the defendant in paying off the charge in favour of his sister for the like amount on his lands, the plaintiff has a good charge on those lands for that sum with interest. After careful consideration I am satisfied that this order was right, and that here again the law is in harmony with justice and good sense. According to the statement of defence and the finding of Kenny J., it was agreed between the plaintiff and the defendant that this sum of £400 should be applied in paying off the charge on the defendant's lands. The consideration for that agreement was one which, as I have said, has wholly failed. The defendant's lands have been relieved from that charge; the plaintiff's money paid upon that consideration which has wholly failed can be traced into these lands, and she is entitled in equity to stand as an incumbrancer for the amount on the lands.

RONAN L.J.:—

In England no Court had any power to dissolve a valid marriage until the passing of the Matrimonial Causes Act of 1857; sect. 31 of that Act gave the Court jurisdiction to do so. Sect. 22 of the Act is as follows:—"In all suits and proceedings, *other than proceedings to dissolve any marriage*, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted." No such jurisdiction to dissolve a valid marriage has ever been conferred on any Irish Court, and accordingly in sect. 13 of the Matrimonial Causes (Ireland) Act of 1870, which is otherwise identical with sect. 22 of the English Act, the words which I have marked in italics in the latter are omitted.

The expression "divorce," in the cases in England prior to 1857, did not mean the dissolution of a valid marriage. It had two meanings—(1) A divorce a mensa et thoro, which did not dissolve the marriage, but was equivalent to a judicial separation. (2) A divorce a vinculo, which was really a decree of nullity of marriage. "The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all": *Napier* v. *Napier* (1). This is the only power the Irish Court has of making a decree which puts an end to a marriage. The Ecclesiastical Court and the Irish Matrimonial Court (now a division of the High Court of Justice) had no power to make a decree of divorce a vinculo unless they were satisfied that there never had been a valid marriage, and the decree was a declaratory decree to the effect that there never had been such a marriage.

The decree for dissolution is "that the marriage be dissolved"; it is based on a valid marriage, and it puts an end to it. Until the decree, the parties are husband and wife. "The decree . . . is not complete until it is made absolute, and until complete it is inoperative to alter the wife's status." On the other hand, the decree for nullity in the present case is in the usual form. "The judge in open Court by his final decree pronounced and adjudged that the form of marriage between the petitioner and the said Timothy P—— was and is null and void, and that the petitioner is free from all bond of marriage with the said respondent."

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(1) [1915] P., at p. 186.

There has been no attempt to impeach this decree on any ground. It is not only a judgment in rem on the status of the parties, but it is also a judgment between the parties to this action on the very question at issue, *i.e.*, whether there ever was a marriage between them. Further, it is expressly pleaded in the statement of claim. On every possible ground it is conclusive evidence in this action that there was a marriage between the parties.

What is the basis of the decree? The express findings of the judge—(1) That at the date of the ceremony of marriage the respondent was incapable of the act of generation; (2) that said incapacity is incurable. What is the effect of this in the ecclesiastical law? "Marriage must be an agreement of the parties looking to the consortium vitae. An agreement indeed of parties capable of the concubitus, for though the concubitus itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract": *per* Lord Stowell in *Dalrymple* v. *Dalrymple* (1). Neither in the Spiritual Court nor the Civil Court was there such a theory as a marriage valid up to a certain time, and thenceforward void. This could only arise under a special Act of Parliament. Apart from such an Act, the parties were either never married or married for ever, and this was so both in the Spiritual and Temporal Courts.

The main argument in the present case was that the decree for nullity being made in respect of a canonical disability, the parties were man and wife, and the marriage a valid marriage, up to the date of the decree; that it was a voidable and not a void marriage, and good until set aside.

The judgment of Sir John Nicholl in *Elliott* v. *Gurr* (2) was mainly relied on. The passage in that judgment is set out in the article "Nullity of Marriage" in the Encyclopædia of English Law (2nd ed., vol. x, p. 91), and thus dealt with:—"The distinction between void and voidable marriages is so forcibly pointed out in the leading case of *Elliott* v. *Gurr* (1) that the language there used has been adopted by all the leading text-writers on the subject. The marriage there in question was within the degrees prohibited by canonical law, for the husband was, by affinity, the wife's nephew, being the sister's son of her former husband; and this case arose out of a question as to the right of administration after the wife's death. The learned judge of the Prerogative Court of Canterbury (Sir John Nicholl), in giving judgment (pp. 18, 19), said: 'The difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, such as prior marriage, want of age, idiocy, and the like, make the contract void *ab initio*—not merely voidable: these do not dissolve a contract already made, but they render the parties incapable of contracting at all: they do not put asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union; and therefore no sentence of avoidance is necessary. The present is not a void, but a voidable, marriage; and therefore not having been declared void in the lifetime of the parties, is valid to all civil purposes; and to all such purposes the deceased died the wife of William Gurr, and he was her husband, and their issue are legitimate.' "

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(1) 2 Hag. Con., at p. 63.

(2) 2 Phillim. 16.

The first sentence is original; the rest is in the language of Blackstone (1 Bl. Com., pp. 434, 435), but omits the words of Blackstone immediately following the words "lifetime of the parties," viz., "For after the death of either of them the Courts of Common Law will not suffer the Spiritual Courts to declare such marriages to have been void, . . . and therefore when a man had married his first wife's sister" (then only a canonical disability), "and after her death the Bishops' Court was proceeding to annul the marriage and bastardize the issue, the Court of King's Bench granted a prohibition *quoad hoc*; but permitted them to proceed to punish the husband for incest: *Harris* v. *Hicks* (1). These canonical disabilities being entirely the province of the Ecclesiastical Courts, our books are perfectly silent about them." This shows clearly that the word "until" does not mean that the marriage was valid up to the date of the decree, and only invalid from that date, but that the declaration of "such marriage to have been void" meant void *ab initio*, and that the effect of the declaration was to bastardize the issue of the marriage born at any time. There is no doubt that this is the effect of divorce a vinculo, or decree of nullity. "So if a man marry, and be afterwards divorced a vinculo, the issue between them, born before or after the divorce, will be bastards: Com. Dig., p. 258, Bastard (A).

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(1) 2 Phillim. 16.

In *Thornley* v. *Thornley* (2), speaking of a dissolution of marriage under the Act of 1857, Romer J. says, at p. 233: "What happened, then, on the divorce taking place? They ceased to be husband and wife." On the other hand, in the case of *In re Boddington* (3), cited for the plaintiff, Fry J., speaking of the effect of a decree of nullity, says: "She is described in the will as the testator's wife, which she was not at the time of the will, and in law never had been."

Affinity and impotence are both canonical disabilities, and a decree of nullity in respect of impotence must have the same effect as a decree in respect of affinity. The fact that the effect of the decree is to bastardize the issue born at any time, is conclusive that the parties were never united in lawful matrimony, and that there never was at any time a lawful marriage.

Lord Lyndhurst's Act (5 & 6 Wm. IV, c. 54) provided that marriages between persons within the prohibited degrees should be absolutely "null and void to all intents and purposes whatsoever." The object of this appears from the recital in sect. 1: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period." This clearly shows that the effect of the decree of nullity was to make the marriage void *ab initio*, not to dissolve or annul it as from the date of the decree. The effect of the Act was really to make the former canonical disability a civil disability also.

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(1) 2 Salk. 548.

(2) [1893] 2 Ch. 229.

(3) 22 Ch. D. 597.

The statute did not alter the law as to any other canonical disability, and the disability of impotence remained as it was before, a canonical disability only. Consequently, the state of the law relating to it is that described in the recital I have quoted. Such a marriage as that in the present case is, therefore, described in the Act as "voidable only by the sentence of the Court." Does this mean that Lord Stowell was wrong when he said it was void? The effect of this statute was the subject of the case of *Brook* v. *Brook* (1). In his argument Sir R. Bethell said (at p. 204):—"Marriages within the prohibited degrees were void by the common law." (He must have meant the canon law of the Ecclesiastical Courts.) "But when the Ecclesiastical Courts attempted to enforce that law to the extent of declaring, after the death of the parents, the children to be illegitimate, the common law interfered to prevent that consequence, and hence grew up the distinction between marriages void and voidable. The latter word is not quite accurate. It should have been said that the marriage was void, but that the law would not allow it to be so treated after the death of one of the parties." At p. 240 of the same case Lord Wensleydale, speaking of the effect of the Act, says:—"Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable; that is, which were really void according to our law, though they could only be avoided by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties."

Lord Justice Pickford, at pp. 189, 190 of his judgment in *Napier* v. *Napier* (2), also refers to the inconsistency of the word 'voidable' when applied to a void marriage by an Ecclesiastical Court.

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(1) 9 H. L. C. 193.

(2) [1915] P. 184.

I shall not repeat what the Lord Chancellor has said as to *Lewis* v. *Hayward* (1).

It seems to me that the true view of the matter is this:—1. In the Ecclesiastical Court, though the marriage was void in case of a canonical disability, the Court *might* refuse to declare it void if the applicant had by his conduct in the opinion of the Court disentitled him or her to have it so declared (see *per* Lord Selborne in *G.* v. *M.* (2)), and *must* refuse to do so after the death of one of the parties. This is analogous to the familiar practice of the King's Bench in refusing to quash a conviction admittedly void on its face, because the applicant had by his conduct become disentitled to the order. The refusal of the Court to quash the void conviction on certiorari would not prevent the applicant or anyone else from setting up its invalidity if it was relied on in any other proceeding, and the Court would, in such proceeding, be bound to hold it void.

It is otherwise in case of a marriage void through a canonical disability only. The Civil Court only recognizes civil disabilities. The Spiritual Court had exclusive jurisdiction as to canonical disabilities. A sentence of nullity by the Spiritual Court was the only mode of proving in a Civil Court that such a marriage was void. It must have been declared void by the only Court having jurisdiction to do so. Blackstone says (1 Bl. Com., p. 435):—"These canonical disabilities being entirely the provision of the Ecclesiastical Courts, our books are perfectly silent concerning them." In *The Duchess of Kingston's Case* (3), De Grey C.J. says:—"Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognizance of questioning and deciding directly the legality of marriage. . . . And therefore where, in civil causes, they found the question of marriage directly determined by the Ecclesiastical Courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a Court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other Courts. Hence a sentence of nullity and a sentence in affirmance of a marriage have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to real estate." De Grey C.J. limited the admissibility of the decree to suits between the same parties, and did not adopt the modern doctrine of the judgment as to status being a judgment in rem; but, even on his narrow view, the present decree would be conclusive in this case.

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(1) 35 L. J. Prob. 105.

(2) 10 A. C., at p. 186.

(3) 2 Sm. L. C., 12th ed., pp. 755, 757.

In the Civil Court, if a marriage was alleged to be void by reason of a civil disability of one of the parties, the Court could try and determine the question itself, just as it could try and determine the validity of a conviction alleged to be bad on the face of it, though not quashed on certiorari. But in the case of a marriage impeached on the ground of canonical disability, the Civil Court could not entertain the question. The canonical disabilities were entirely the province of the Ecclesiastical Courts. It follows, therefore, that in such a case the only evidence of the invalidity of a marriage, void only on a canonical disability, would be the decree of the Ecclesiastical Court. In such a case, the only questions for the Civil Court are—(1) whether there is a sentence of the Spiritual Court, and (2) what is that sentence? If it is a sentence that there never was a marriage, and the sentence is not impeached on any ground, the Civil Court must treat it as final and conclusive. The Civil Court has nothing to say to the question whether the conduct of the party was such as to disentitle him to the sentence, whether by electing to approbate the marriage or otherwise; all that is for the Spiritual Court, and the sentence is conclusive. In fact, in the Civil Court the distinction between marriages is not between void and voidable marriages, but between marriages the invalidity of which can only be proved by the sentence of the Spiritual Court, and those which can be proved invalid by other evidence also. It is entirely a question of proof. In all cases whether of civil or canonical disability the sentence of the Spiritual Court is the same, that there never was a marriage, and the sentence is equally conclusive in all cases. See *Andrews* v. *Ross* (1), where the Court made a decree of nullity in the case of a marriage made absolutely null and void by Lord Lyndhurst's Act.

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(1) 14 P. D. 15.

I therefore deal with this case on the basis that there was conclusive evidence "that the form of marriage between the plaintiff and the defendant was and is null and void," and that there never was any marriage.

The fortune of the plaintiff was represented by £375 cash, and a sum of £100 secured by a promissory note payable to the defendant. This cash and note were handed to the defendant two days before the marriage. It was at one time suggested by defendant's counsel that this was an immediate absolute final gift to the defendant which would have taken effect if there never was any form of marriage. However, this was not persisted in. Once it was admitted that there was not an immediate complete final gift, *Ayerst* v. *Jenkins* (1) has no application to the case.

The last paragraph of the defence is as follows:—"The defendant further says that, prior to the date of the marriage between the plaintiff and defendant, the plaintiff was informed by the defendant that the defendant's sister was, under the will of defendant's father, entitled to a charge of £400 as her portion upon the farms of the defendant, and upon the treaty for the marriage between the plaintiff and defendant it was agreed between the plaintiff and the defendant that the said portion of £400 payable to the defendant's sister should be paid to the defendant's sister and discharged out of the said sum of £475, the plaintiff's marriage portion, and the said portion of £400 was, with the knowledge of the plaintiff, in pursuance of the said agreement, paid by the defendant to the defendant's sister out of the said respective sums of £375 and £100 when the same were paid by the plaintiff to the defendant." The judge at the trial found that the agreement there alleged was proved. The defendant's counsel accepted this finding, and admitted that the cash and note were received by the defendant on the terms of this agreement. Admittedly the delivery of the cash and note to the defendant did not pass the beneficial interest to him. If the plaintiff had died the following day, is there any doubt that the cash and note would be a part of her assets? The defendant received the money upon trust to invest it as stated. He did so invest it. If the marriage took place, the plaintiff would have been the wife of a man with an unincumbered, not an incumbered farm. A common expression in the South of Ireland that I have even heard eminent counsel use in civil-bill appeals is, "She married into the farm." She would say, "My fortune went into the farm." When the husband's father is living, and owner of the farm, the usual marriage arrangement is that the wife's fortune is paid to the father, and he assigns the farm to the son. The money goes into the farm. This application of the money in the purchase of this charge was an essential term of the agreement.

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(1) L. R. 16 Eq. 275.

But what was the agreement as to the beneficial ownership of the wife's fortune? In the absence of agreement, prior to the Married Women's Property Act, it would only have become the husband's property on the marriage. Since the Act it would have remained hers even after the marriage. Surely there can be no doubt that if the agreement had been reduced to writing it would have been that the defendant agreed to hold the money in trust for the wife until the marriage, and after the marriage upon trust to applying £400 of it in releasing his own farm from the charge of £400, and to hold the balance for his own benefit. It cannot possibly be argued that he took the money and could so apply it for his own benefit if there never was any form of marriage. The defendant's counsel was driven to argue that the agreement was that it was to be his if he went through a form of marriage.

In *Chapman* v. *Bradley* (1), the head-note is as follows:—

"A domiciled Englishman, a widower with six children, went through the ceremony of marriage with his deceased wife's niece in Neufchatel, in Switzerland, where such a marriage is valid. It appeared, however, that the parties were under the impression that the marriage, being good in Switzerland, would also be good here. On this occasion a settlement of reversionary personal estate belonging to the husband was executed by him and the lady, the consideration for which was expressed to be his intended marriage, the natural love and affection which the settlor bore for his children by his late wife, and divers other good con-

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(1) 4 De G. J. & S. 71.

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siderations, and under which the trustees were to hold the property in trust for the settlor, his executors, administrators, or assigns, until the intended marriage should be *solemnized*, and afterwards upon trusts for the settlor and his intended wife for their lives, or as to the latter her widowhood, with remainder in trust for such of the settlor's children, whether by his former marriage or by the intended marriage, as being sons should attain twenty-one, or being daughters should attain that age or marry :—*Held*, that the word 'solemnized' as used in the settlement, meant 'validly and effectually solemnized,' and that inasmuch as there never had been a valid and effectual solemnization according to English law of the intended marriage, and the settlor was dead, without having changed his domicil, the whole beneficial interest in the property comprised in the settlement was vested in him at the time of his death, and that neither the second wife nor any child of the settlor or of the second wife acquired any interest in such property."

Lord Justice Knight Bruce said :—" What I should propose to do is this, viz., to declare *that as a valid marriage has never taken place* between the testator and the defendant, the whole beneficial interest in the funds and property comprised in the settlement was vested in the testator at the time of his death, and that neither the defendant nor any child of the testator or of the defendant acquired any interest in such funds or property." If there had been a decree of nullity in the case, the words I have put in italics would have been practically the words of the decree.

This case was followed by Malins V.-C. in *Pawson* v. *Brown* (1). *Neale* v. *Neale* (2) was a decision to the same effect. These cases were no doubt all cases of marriages ipso facto void, or whose invalidity could be proved otherwise than by the sentence of the Spiritual Court. However, the basis of the decisions was that there was no valid marriage, and the decree in the present case proves that there never was a valid marriage.

Dormer v. *Ward* (3) was a case in which the marriage was declared to have been null and void on the ground of the impotence

(1) 13 Ch. D. 202.
(2) 79 L. T. 629.
(3) [1900] P. 130.

of the husband, as in the present case. The question arose on an application to vary a marriage settlement. The settlement was expressed to be in consideration of the said intended marriage. The husband covenanted that if the marriage took place he would make certain payments, and he made certain appointments of jointure, &c., in case the marriage should take effect, and created a certain term of years to commence from the solemnization of the intended marriage.

At p. 138 Gorell Barnes J. said :—"The reasons suggested for this were, first, that the jointure rentcharge and term could only come into force if the marriage should take effect, and that as the marriage has been declared void it did not take effect, and the jointure rentcharge and term cannot come into force, and *the settlement was without consideration.* The cases of *Chapman* v. *Bradley* (1) and *Pawson* v. *Brown* (2) appear to me to support these reasons . . . It was further urged that the marriage was not void, but voidable, and that it had taken effect. The petitioner had the right to elect whether to treat the marriage as void or not, and at her instigation it has been declared void, and, in my opinion, has not taken effect within the meaning of the deed."

This case came on appeal (3) before Lord Halsbury, A. L. Smith M.R., and Vaughan Williams L.J., the last-mentioned of whom delivered the judgment of the Court. He said (at p. 34) :— "Now, it is said that the jointure rentcharge and term could only come into force if the marriage should take effect, and that as the marriage has been declared void it did not take effect, and the jointure rentcharge and term cannot come into force, and the settlement was without consideration. Gorell Barnes J. says that the cases of *Chapman* v. *Bradley* (1) and *Pawson* v. *Brown* (2) support these reasons. I agree with the learned judge as to the effect of these cases, except that, as a deed does not require consideration, I should rather have said the condition had not happened on which the deed was to take effect, than that the deed was without consideration." The Lord Chancellor and

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(1) 4 D. J. & S. 71.
(2) 13 Ch. D. 202.
(3) [1901], P. 20.

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the Master of the Rolls agreed in the judgment. We have, therefore, laid down by Lord Halsbury C., A. L. Smith M.R., Vaughan Williams L.J., and Gorell Barnes J.:—1. That the effect of the sentence in such a case as this has the same operation on a marriage contract as if the marriage was ipso facto void; for this is the effect of holding the case governed by *Chapman* v. *Bradley* (1). 2. That this simply means that there is no distinction between a so-called "voidable" and a "void" marriage, once the decree of nullity is made. 3. That there was no consideration for the contract other than the consideration implied when the contract was under seal, which does not exist in this case. In that case the marriage was in 1885. The decree was made absolute in 1897, twelve years after the marriage. Here the decree was only six years after the marriage.

Under the circumstances I am clearly of opinion that the defendant applied the moneys received by him as trustee in the purchase of the charge; that, in the events which have happened, there never was a marriage, and that the trust for the plaintiff until the marriage was never determined; that consequently the defendant purchased and holds the charge in trust for her, and that she is entitled to a declaration to that effect. Of course, in the case of a trustee investing the trust fund in a charge on his own estate, merger is out of the question. The defendant has received the rents and profits of his land since the purchase without paying the interest on the £400. No claim has been made for this interest, so that in substance he has had the income of the trust fund up to the present. The corpus of the £400 is forthcoming and represented by the charge.

However, the defendant has lodged the £400 in Court. The plaintiff is willing to accept it in full dicharge of all claims in the action. The defendant's counsel, while insisting that they are entitled to have the appeal allowed with costs, state that they would prefer an order for payment of the £400 on the terms aforesaid to such a declaration as above mentioned. We shall make the order for payment accordingly, but the defendant must pay the costs here and in the Courts below.

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(1) 4 D. J. & S. 71.

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MOLONY L.J. :—

This action was originally brought to recover the sum of £475, money received by the defendant for the use of the plaintiff, but by leave of the Court the pleadings were allowed to be amended by claiming, in addition, a declaration that the plaintiff is entitled to a charge on the defendant's lands for £400.

In the month of February, 1909, the plaintiff was residing with her brother, Edward M'D——, and the defendant was a farmer, residing on a farm a few miles away, of which he was absolute owner, subject to a charge of £400 in favour of his sister. A marriage was arranged between the plaintiff and the defendant, and it was agreed that the marriage portion of the plaintiff should be fixed at the sum of £475. A few days before the ceremony Edward M'D——, the plaintiff's brother, handed the defendant the sum of £375, and a promissory note for £100, payable 12 months after date. It was found by the learned judge at the trial that it was agreed between the parties that the £400 charged on the defendant's farm was to be paid off out of the plaintiff's fortune, and that this sum was in fact paid. The bill for £100 was duly met on maturity, and consequently the defendant received the whole of the fortune promised to him on the marriage.

On the 13th January, 1915, the plaintiff presented a petition to have the ceremony of marriage declared null and void on the ground of impotency on the part of the defendant, and on the 11th May, 1915, a decree was pronounced by the Court declaring that the ceremony of marriage between the petitioner and respondent "was and is null and void" by reason of the incurable impotency of the respondent, and that the petitioner "is free from all bond of marriage with the said respondent."

Between the date of the petition and the pronouncement of the decree the plaintiff, on the 2nd February, 1915, instituted the present action, and the writ and statement of claim were on the 2nd June, 1915, amended pursuant to the order of the Court by substituting the name "Mary Anne M'D——," being the maiden name of the plaintiff, as plaintiff.

The defendant in his defence admits that the £475 was paid as a marriage portion, and further says it was paid "in consideration of the celebration between the plaintiff and defendant of a lawful marriage," and that the marriage between the plaintiff and defendant was not a void marriage, but a marriage voidable at the election of the plaintiff, and that as the £475 was paid to him absolutely, he is entitled to retain said sum although the marriage has since been declared void. He also relies upon the agreement to pay off the charge of £400 as binding upon the plaintiff, notwithstanding the matrimonial decree, and that she is not entitled either to follow the money or to stand in the place of the defendant's sister as against the said lands.

Where impotency exists in either party at the time of the solemnization of the marriage, the marriage may be avoided by the party who is fit. There was a good deal of discussion in the present case as to whether such marriages were to be considered absolutely void, or only voidable. It is clear on the authorities that such marriages (though in fact void) are deemed valid for civil purposes unless and until a sentence of nullity is obtained. The decree when obtained, however, declares the marriage null and void *ab initio,* and this form of decree was carefully settled by the House of Lords in *Lewis* v. *Hayward* (1), and has always in substance been followed since. The decree in the present case declares that the ceremony between the plaintiff and the defendant was and is null and void.

With what object was the £475 paid? It was paid, according to the plaintiff, in consideration of a valid and effectual marriage capable of consummation; and according to the defendant it was paid in consideration of the performance of a ceremony irrespective of the fact as to whether or not the marriage was capable of consummation. It is, I think, absolutely clear that the parties contemplated, not an idle ceremony, but a marriage valid and effectual in every respect; and it having been found by the Court that the ceremony was null and void, there has been a total failure of consideration.

It was attempted to be argued that at most there was only a partial failure of consideration, and that the plaintiff got certain advantages in the way of board and residence which should be taken into account. This, however, was merely incidental to the supposed relations of the parties, and in no way formed part of the real consideration for the contract, and must be disregarded. If we were entitled to go into such matters, it would probably be found that the plaintiff earned by her work and services much more than what she received by way of support.

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(1) 35 L. J Prob. 105.

The position then is that £475 has been paid to the defendant by the plaintiff for a consideration which has wholly failed, and I think the passage from Dyer's Reports, 13*a*, quoted by Mr. Justice Madden, is applicable to the present case:—A man gives certain goods with his daughter to one in marriage, and then they are divorced: the question was whether the wife should have the goods back. It was held reasonable that she should have them, for the goods were given in advancement of her marriage, and *cessante causa cessat effectus*, "so that the wife shall have back the goods not spent."

Mr. Justice Madden, in delivering judgment in the King's Bench Division, drew a distinction between the £400 which was applied in payment of the charge, and the £75 which was expended for the joint benefit of the plaintiff and defendant while living together in the supposed relation of husband and wife. He held that the latter was a concluded transaction by which both parties benefited, and ought not now to be disturbed, and I think that in this he was perfectly right.

The £400, however, has been specifically traced into the hands of the defendant's sister, and was received by her in payment of the legal charge which she had on the defendant's farm. The defendant received the money in consideration of a valid and not a void marriage, and I have no doubt but that the plaintiff is entitled to stand in the place of the defendant's sister in regard to the charge which was paid off with her money.

As regards the question of pleading which was discussed by Mr. Samuels, and the effect of the writ having been issued after the petition but before the decree, I find myself in full agreement with the views of the Lord Chancellor and Lord Justice Ronan, and have nothing to add.

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The case subsequently (June 25) appeared in the list to be spoken to on the minutes of the order, and the following order was made:—"The Court being of opinion that the plaintiff is entitled to a declaration that the said lands are well charged with the sum of £400, portion of the marriage dowry of the plaintiff, and that she is entitled to such charge, and it appearing that there is in Court to the credit of this action the sum of £400, and counsel for the defendant stating to the Court that, while still insisting that the defendant is entitled to have the action dismissed with costs, he would prefer that, in lieu of such declaration as aforesaid, the said sum should be paid out to the plaintiff in full satisfaction and discharge of all her claims in this action, including her claim to such charge, and the plaintiff, by her said counsel, consenting to accept such payment in full discharge as aforesaid, it is this day ordered that the said order of the King's Bench Division, dated the 21st day of December, 1915, do stand discharged, save so far as the same directs the payment of costs, and in lieu thereof it is ordered that the judgment of the Right Hon. Mr. Justice Kenny at the trial of this action do stand discharged, and that the judgment (if any) entered pursuant thereto be vacated; and it is further ordered that the Accountant-General do pay out to the plaintiff the sum of £400, lodged in Court by the defendant pursuant to the said order dated the 21st day of December, 1915, . . . in full discharge of all the plaintiff's claim in this action as aforesaid; and it is further ordered that the order of the King's Bench Division, dated the 16th day of December, 1915, be (and the same is hereby) affirmed, and that the appeal from the said order do stand dismissed; and it is ordered that the defendant . . . do pay to the plaintiff . . . her costs of this appeal properly and necessarily incurred when taxed by the taxing master; and it is ordered that the plaintiff be at liberty to vacate the lis pendens registered by her pursuant to the said order dated the 16th day of December, 1915, against the lands in the said order mentioned."

Solicitor for the plaintiff: *Laurence J. Ryan.*
Solicitor for the defendant: *Allen H. Morgan.*

J. G. T.

K. B. Div.
1916.
July 6, 7.

BURNS *v.* JOHNSTON (1).

False Imprisonment—Volenti non fit injuria—*Workman in Factory—Hours of Employment—Quitting Work before End of—Gate of Factory locked—Refusal of Employer to give Facilities for leaving Factory.*

Under sect. 150 of the Factory and Workshop Act, 1901, and the Defence of the Realm (Consolidation) Regulations, 1914, as amended by article 6 A of the Order in Council, 1915, the defendant, the owner of a factory, extended, with the sanction of the Home Secretary, the working hours in the factory by one half hour in the evening, and accordingly the period of employment ran from 6 a.m. to 6.30 p.m. A fortnight before the intended change was to have come into operation, notice to that effect was posted in the factory, and was seen by the plaintiff, one of the workers. The plaintiff gave no notice of his intention to leave the employment. During working hours the yard gate of the factory was always kept locked, and no worker could leave the premises during those hours without a pass. When the new regulation came into force, the defendant gave instructions that the yard gate was to be kept locked till 6.30 p.m. The plaintiff came to work as usual. He came out of the factory at 6 p.m., and demanded to be let out. The defendant refused to allow the gate to be opened, and the plaintiff was detained until 6.30 p.m. The plaintiff brought an action to recover damages for false imprisonment by the defendant.

Held, that it was a term of the employment, accepted by the plaintiff, that he should remain at work until 6.30 p.m.; that although the defendant might not be entitled to interfere actively to prevent his leaving before that time, he was not bound to afford facilities to him for doing so; and that the facts proved did not constitute false imprisonment.

Herd v. *Weardale Steel, Coal, and Coke Company, Ltd.*, [1915] A. C. 67, applied.

Case Stated under 27 & 28 Vict. c. 99, s. 35, by Pim J., on the hearing of a civil-bill appeal, at the Armagh Spring Assizes, 1916. The appeal was by the defendant against a decree of one shilling with costs granted by the county court judge at Lurgan. The case set out as follows:—

"The case was one of 130 that were brought by weavers (ninety-eight men and thirty-two women) in the employment of Messrs. Johnston, Allen, & Co., Linen Manufacturers, Lurgan, and the civil bill claimed £10 damages for that the defendant, his agents, and servants, on the 14th September, 1915, falsely and without reasonable cause imprisoned the plaintiff to the plaintiff's loss and damage in the said sum. The facts were admitted on both sides, and I found that the plaintiff had been a weaver in the factory of Messrs. Johnston, Allen & Co., for about eighteen years, and that the defendant was the senior partner of the said firm. The hours of employment in the said factory were regulated by the Factory Acts. Normally these hours were from 6 A.M. to 6 P.M., but at various times the hours of employment had been changed. It was customary in this factory to post up a notice of intended change of hours of work for one fortnight prior to this change coming into operation. It was alleged, and not denied, that a similar custom existed in the trade in Lurgan. It was a term of employment in the said factory that such employment could be terminated by a fortnight's notice on either side. After the outbreak of war a great number of the workers in the factory joined the army, so that the numbers employed were reduced from about 350 to about 200.

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(1) Before Cherry L.C.J. and Gibson J.

"Owing to the depression in the weaving trade a number of looms in the said factory had to remain idle, and the hours of employment were reduced from 55 to 48½ per week, and the usual fortnight's notice of the change was given. Evidence was given that this was done in order to enable any worker who so desired to seek employment elsewhere. All workers are paid by piece-work. In the summer of 1915 trade improved, and the hours of employment were again changed, after the usual fortnight's notice, to the normal working hours—6 A.M. to 6 P.M. In the month of August, 1915, Messrs. Johnston, Allen, & Co. were negotiating with the French Government for a contract for aeroplane cloth which required to be executed with all speed, and in consequence they applied to the Home Office for an extension of the hours of work in the factory beyond those sanctioned by the Factory Acts. The said firm received an order from the Home Secretary dated the 25th of August, 1915, enclosing a notice to be affixed in the factory. [Copies of the order and notice were attached to the case. The order authorized employment on week days, other than Saturdays, from 6 A.M. to 6.30 P.M. The notice set out the overtime authorized, commencing on the 1st September, 1915.]

"Notice of defendant's intention to make the change of hours was served on the factory inspector, and the original notice received from the Home Office was, upon the 30th August, posted up in the factory, and was seen on that date by the workers, including the plaintiff. After this notice had been posted up in the factory, a letter dated the 30th August, 1915, was received by the said firm from the Ulster Weavers and Winders Trades Union." [The letter stated that the workers were not satisfied to work overtime at the old rate, and that they asked a bonus of 20 per cent. To this letter a reply dated 31st August, 1915, was sent by the defendant's firm, stating that the matter in question had nothing to do with the rate of wages.]

"The defendant stated that some workers gave notice to leave the employment of the said firm at the end of the fortnight, the point of time when, according to the rule in the said factory, the change of hours set out in the said notice would be enforced. None of the 130 plaintiffs gave any such notice.

"During working hours the yard gate of the factory was always kept locked except during meal hours, and if a worker had to leave the factory during working hours, he or she had to obtain from the tenter or foreman a pass, which had to be given to the gatekeeper before leaving. Without such a pass a worker could not leave the factory during working hours. On the 14th September, 1915, the defendant gave instructions that the yard gate was to be kept locked until 6.30 P.M. On that evening at 6 o'clock, while the machinery in the factory was still running, 130 of the workers (including the plaintiff) came out of the factory towards the gate, and demanded to be let out. The defendant refused to allow the gate to be opened until 6.30 P.M., and the plaintiff was, with the other workers, detained from 6 P.M. until 6.30 P.M. None of the 130 workers had a pass.

"It was contended on behalf of the plaintiff that the refusal of the defendant to allow the gate to be opened until 6.30 was a false imprisonment of the plaintiff by the defendant, he, the plaintiff, never having agreed to work the half-hour overtime from 6 until 6.30 p.m.; and on behalf of the defendant that the plaintiff, having seen the notice changing the hours of employment, and knowing that said change of hours would be enforced on the said 14th day of September, 1915, had, by coming to his work on the said date, agreed to work on the said date till 6.30 p.m., according to the ordinary regulations of said factory; and that the refusal of the defendant to allow the factory gate to be opened before 6.30 p.m. did not constitute any false imprisonment of the plaintiff by the defendant.

"At the request of both parties I consented to state this case for the opinion of a Divisional Court. . . .

"I find as facts that on and from the morning of the 14th of September the hours of employment in the said factory were changed from 6 a.m. till 6 p.m. to 6 a.m. till 6.30 p.m., that the defendant was empowered to make said change, and that the plaintiff had due notice of the change. The question of law for the Divisional Court is: Do the above facts constitute a false imprisonment of the plaintiff by the defendant? I expressed no opinion as to the question at issue."

On the argument before the King's Bench Division it was agreed that the Court should be at liberty to draw inferences of fact.

T. W. Brown (with him *D. M. Wilson K.C.*), for the defendant:—

The working hours in the factory were legally and properly extended under section 150 of the Factory and Workshop Act, 1901 (1 Ed. 7, c. 22), and the Defence of the Realm (Consolidation) Regulations, 1914, as amended by Article 6 A of the Order in Council, No. 551 of 1915. The plaintiff and the other workers on whose behalf proceedings were taken had, by their conduct, acquiesced in the regulation extending the working hours to 6.30 p.m. They knew it was part of their contract that the yard gate was to be kept locked during working hours, and that no workman was permitted to leave during that period without a pass, which would only be given for good and sufficient cause. The plaintiff broke his contract, and the defendant was not bound to facilitate him in violating his contractual obligation. This case is clearly governed by *Herd* v. *Weardale Steel, Coal, and Coke Co.* (1).

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(1) [1913] 2 K. B. 771; [1915] A. C. 67.

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M. Maguire and *Chambers K.C.* for the plaintiff:—

The plaintiff did not contract to work during the additional half-hour, and that being so, there can be no justification for keeping him locked in after 6 o'clock. Even assuming that the plaintiff was bound by contract to work till 6.30 p.m., the action of the defendant in refusing to open the gate amounted to a punishment in the shape of false imprisonment. Only by straining *Herd's Case* (1) could it be said that it was an authority justifying the action of the defendant. *Herd's Case* (1) is distinguishable, inasmuch as the times for raising the men were fixed, and what was demanded by the miner, who clearly broke a contract the terms of which were known to all parties, was the employment of expensive machinery to facilitate him to leave the mine.

D. M. Wilson K.C. in reply.

Cur. adv. vult.

July 7.

CHERRY L.C.J.:—

This is a test action brought by the plaintiff, who is a workman in the employment of the defendant's firm, to recover damages for alleged false imprisonment by the defendant, under the circumstances fully set out in the case stated. A number of other actions, about 130 in all, depend upon the result of the present action; so that, apart from the question of law involved, the case is of some importance.

The plaintiff has been a weaver in the defendant's factory for about eighteen years; the hours of employment in the factory are regulated by the Factory Acts. Normally these hours are from 6 a.m. till 6 p.m., but at various times the hours of employment have been changed. It is customary to put up a notice of intended change of hours for one fortnight prior to a change coming into operation.

In the month of August, 1915, the defendant applied to the Home Secretary, under sect. 150 of the Factory Act, 1901, for permission to extend the hours of work in the factory beyond those sanctioned by the Factory Acts, and received an order on the 25th August sanctioning that course. The working hours were then extended for half an hour, to 6.30 p.m. A notice to that effect was on the 30th August posted up in the factory, and was seen on that date by the workers, including the plaintiff. The change was to begin on the 14th September, 1915. The defendant stated that some workers gave notice to leave his employment in consequence of the change of hours, but that none of the 130 plaintiffs gave any such notice.

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(1) [1913] 2 K. B. 771; [1915] A. C. 67.

During working hours the yard gate of the factory was always kept locked; and if a worker had to leave the factory during working hours, he or she had to obtain a pass, which had to be given to the gate-keeper before leaving. Without such a pass a worker could not leave the factory during working hours.

The defendant's counsel contended that this custom of keeping the yard gate locked during working hours, and preventing the workers from leaving without sufficient cause during those hours, formed part of the contract by which the work-people were bound. The learned judge has not stated that he arrived at any such conclusion, and it may be necessary, inasmuch as the case is stated on a question of law only, for us to draw inferences of fact from the evidence, and both sides agreed that we should be allowed to do so. Acting on this permission, I arrive at the conclusion that the defendant's contention is right on this point, and that the work-people are bound, as a term of their contract, by the rule as to the closing of the gates.

On the 14th September, 1915, the defendant gave instructions that the yard gate was to be kept locked until 6.30 p.m. On this evening, at six o'clock, 130 of the workers, including the plaintiff, came out of the factory, and demanded to be let out. The defendant refused to allow the gate to be opened until 6.30 p.m., and the plaintiff was, with the other workers, detained until that hour. None of the workers on the occasion had a pass.

The question now arises: Were the plaintiff and the other workers bound by the rule as to the closing of the gates during the last half hour of work in the same way as, in my opinion, they were bound during the ordinary hours, 6 a.m. to 6 p.m.? In my opinion they were. Having had notice of the intended change for a fortnight, and not having served any notice of intention to leave the defendant's employment, they must, I think, be taken to have agreed to the change in the hours. Otherwise they should not have gone to work on the 14th September.

The case, in my opinion, comes within the principles laid down by the House of Lords in the recent case of *Herd* v. *Weardale Steel, Coal, and Coke Co., Ltd.* (1), and the facts in the present case strongly resemble those proved in that case. There, a coal miner descended a coal mine for the purpose of working therein for his employers at 9.30 a.m. On arriving at the bottom of the mine he was ordered to do certain work which he wrongfully refused to do, and at 11 a.m. he requested to be taken to the surface in a lift, which was the only means of egress from the mine. In the ordinary course he would have been entitled to be raised to the surface at 4 p.m. The employers refused to permit him to use the lift until 1.30 p.m., although it had been available for the carriage of men to the surface from 1.10 p.m., and in consequence he was detained in the mine against his will. It was held by the House of Lords that an action for false imprisonment could not be maintained, because the contract was to remain in the mine until 4 p.m.; and the principle of *volenti non fit injuria* therefore applied. "The man," Lord Haldane says, at page 73 of the report, "chose to go to the bottom of the mine under these conditions—conditions which he accepted. He had no right to call upon the employers to make use of special machinery put there at their cost, and involving cost in its working, to bring him to the surface just when he pleased."

In my opinion, these remarks of Lord Haldane apply to the present case. It was part of the conditions of his employment that the plaintiff should remain at work until 6.30 p.m.; and although the defendant might not be entitled to interfere actively to prevent his leaving before that time, he was not bound to afford facilities to him for doing so. He was, in my opinion, not bound to open the gates contrary to the ordinary rule for the working of the factory. Had the plaintiff applied for and been refused a pass out, different considerations might arise, but this he did not do.

Mr. Maguire contended in his able argument that even assuming that the plaintiff was not entitled to leave his work, the action of the defendant in refusing to allow the gates to be opened was punitive in character, and such action having been taken with the intention of imprisoning the plaintiff, an action for false imprisonment would consequently lie, even though the plaintiff was leaving in violation of his contract of service. But Lord Haldane, in his judgment in *Herd's Case* (1), deals with this very point, and assumes that an action would not lie under the circumstances, even though the intention was to punish. "There was," he says (p. 72), "no refusal to bring him up at the ordinary time which was in his bargain; but there was a refusal—and I am quite ready to assume that the motive of it was to punish him, I will assume it for the sake of argument, for having refused to go on with his work—by refusing to bring him up at the moment when he claimed to come. Did that amount to false imprisonment? In my opinion it did not." Even though, therefore, we were to draw the inference which plaintiff's counsel suggests, it would not materially assist him.

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(1) [1915] A. C. 67.

For all these reasons I am of opinion that the facts proved in this case do not constitute false imprisonment, and that the question put by the learned judge should be answered in the negative.

Gibson J.:—

This case primarily depends on inferences of fact which the Court has no proper jurisdiction to draw, its function being confined to questions of law arising on ascertained facts. Counsel, however, have agreed that the Court should be at liberty to draw inferences, and I shall dispose of the controversy on that footing.

There are the following questions of fact to be determined:—
1. Did the plaintiff accept the defendant's term that the day should be prolonged for the extra half-hour? 2. Did he accept as a term of his employment the defendant's right to keep the gate locked? 3. On what terms was the gate to be unlocked?

1. Prima facie, on the course of dealing stated in the case, the plaintiff would have been bound to serve for the extended period. What is relied on is the letter of O'Neill (who is assumed to have been the plaintiff's representative) asking for a war bonus. This

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(1) [1915] A. C. 67.

was refused on August 31st, 1915, by letter. The plaintiff, on August 30th, knew of the change of hours, and the terms on which he would be employed. He did not give the usual fortnight's notice, or any notice determining his employment, and on September 14th went to work as usual. Unless he accepted his employer's terms he had no right to be there. Had he objected, he might not have been employed at all. It would be in complete violation of the principles of the law of contract, where a proposal is acted on by the other party without objection, to allow such party to evade the prima facie contract by alleging that he did not intend to be bound. The work was piece-work, and the plaintiff ought to have repudiated the time extension in express terms. He knew that the defendant was only employing him on the new basis, and that the war bonus application was to stand over. I find, therefore, as a fact, that there was a tacit contract (whether the plaintiff in his own mind intended it or not) that the hours were to be extended to 6.30 p.m. Contract, when not evidenced by express language, depends on acts and conduct, and not on secret ideas in the mind of either of the parties. When the plaintiff entered the premises and began to work with an employer who had postponed the increase of pay, but was insisting on the additional time, the defendant was justified in concluding that the plaintiff was assenting to the master's terms. He, by his conduct, held himself out as so assenting, and his employer was entitled so to assume.

2. On the same reasoning, I think it must be taken that the gate was to be kept locked when the shorter working day was in force, and that this was a term of employment accepted by the plaintiff. The same term must be applied to the longer day. It would be absurd that the defendant should be at liberty to have the gate locked up to 6 o'clock, but not from 6 to 6.30 o'clock. The old terms applied to the new arrangement, which only affected duration of work. The plaintiff must have known on September 14th that the gate was locked as previously.

3. The gate was not to be opened without a pass. The case does not inform us on what terms such pass was to be issued. The gate was kept locked in the employer's interest, and plainly the pass was intended to be for his protection. It was not for the purpose of getting a time-sheet filled, for the work was piece-work.

It was, in accordance with familiar factory discipline, to control the workers, avoid irregularity of work, and prevent absence without knowledge of the employer. It would presumably be asked for and given on a special occasion on reasonable personal grounds. I do not think that anyone who wished could at any time demand a pass when he had no reason for going out. On that view, the locking of the gate and the pass would be a meaningless form; the employee could leave when he liked; the pass would be a piece of worthless paper without any effect. The case does not state that the employee was entitled to the pass as of right. If it was unreasonably refused, a different question would have arisen. What was done by the plaintiff and his comrades was a complete repudiation of the pass system. At the lowest, the pass was to enable a note or record to be kept in the foreman's list, book, or memory, of the individual quitting work. Where 130 persons required at once to get out, the issue of passes to each individually would take a considerable time, possibly half an hour. It was necessary to distinguish those quitting from those remaining behind. The plaintiff and his fellow-workers asked for no pass, and their demand was founded on no pass being necessary, as the day's work was done.

It is admitted that if the plaintiff was minded to leave, though in breach of contract, the defendant could not have detained him by locking him in, whether with the object of forcing him to work or by way of punishment. Such detention would be false imprisonment. The defendant's contention is, that this gate was locked in pursuance of contract, and that he was under no contractual duty to issue a pass in the circumstances proved, or to open the gate. He *abstained* from acting, as Lord Justice Buckley puts it in *Herd's Case* (1). He was under no obligation to facilitate or assist the plaintiff in going away before his time in violation of his bargain.

Herd's Case (2), with the judgments in the Court below, was relied on by both sides. Lord Haldane, at page 72, treats the motive of the defendants' act—whether to punish or otherwise—as immaterial. There were two grounds of decision: (1) that the principle *volenti non fit injuria* applied, and that there was no breach of contract by the defendants; (2) that there was no duty on the defendants to supply the plaintiff with facilities for leaving the mine before the regular hour. The circumstances were, no doubt, different from those before us here; but the question is, does the principle of the decision apply? I think the case falls within Lord Haldane's reasoning. What the plaintiff wanted was to get out before his day had expired, and for that purpose to require the defendant to do an act interrupting the existing physical situation in his own favour. This brings in the second ground of the decision in *Herd's Case* (1). Whether the means of egress is by a cage from a mine, or by laying a gangway, or by using a key in a lock, though the cost may be different, all agree in this, that assistance is required from an affirmative act. Suppose a cook in the middle of the night—the outer door being locked, and her employer in bed—wished on a sudden nocturnal caprice to get away, could she sue for false imprisonment if her master declined to get up and open the door to enable her to carry out her breach of contract? The opening of a locked door involves voluntary action which may cause trouble and delay, especially if the staff controlling the key was away at any distance, or where (as here) a number were going and many remaining. If all the dissatisfied workers did not go at the same time, was the gate-keeper to keep unlocking and locking the gate for the thirty minutes? All that the defendant did was that he abstained from an act which the plaintiff was not, by his contract or otherwise, entitled to demand. The defendant did nothing not warranted by his contract. His locking was legitimate, and he was not bound to unlock. If (as I think clear) the workman during working hours could not leave without a pass, he could not complain because he was kept in from not having got or asked for such pass. No pass was asked for, the attitude of the workers being that all their day was finished, and no pass was therefore necessary. The legal position is the same as if the exodus had been attempted before 6 o'clock. The pass, whatever the terms regulating its issue, was a material provision of factory discipline which the employees were not at liberty to repudiate. Probably, had passes been demanded (a step which would have admitted that the factory hours were in force), they would have been refused on the ground that passes were not applicable to simultaneous concerted action of a body seeking to violate their contract. Supposing that passes would have been refused, that would not help the plaintiff. A wrongful refusal would be necessary; and his case is that after six o'clock he was free from all factory restrictions and regulations, and thus needed no pass. In my opinion he was bound by his contract to accept the locking of the gate as legitimate, and *Herd's Case* (1) is directly in point. The plaintiff by wrongfully refusing to work cannot get rid of the employer's right to maintain the existing physical condition of the factory premises, or impose on him a duty of doing an act which he never undertook to do, and which would be contrary to the terms of his bargain with the plaintiff.

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(1) [1913] 2 K. B. 771.

(2) [1915] A. C. 67.

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(1) [1915] A. C. 67.

My conclusion is based on the nature and effect of the contract as inferred by me from the facts stated in the case. The action fails. There was no false imprisonment.

Solicitor for the plaintiff: *A. Campbell.*
Solicitor for the defendant: *T. G. Menary.*

C. L.

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(1) [1915] A. C. 67.

K. B. Div.
1916.
May 29, 30.
June 15.

LORD DE FREYNE *v.* COMMISSIONERS OF INLAND REVENUE (1).

Revenue—Estate Duty—Settled Property—Prior voluntary Charges—Property passing on Death—Valuation of Annuities and Charges—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 7 (1) (*a*).

Under settlements executed in 1877 and 1901, A was tenant for life of certain lands. Prior to the execution of the first of these settlements, A, who was then owner in fee, charged the lands by voluntary deeds with annuities in favour of his brothers and sister, reducible in case of bankruptcy or attempted alienation, and with sums in gross as portions for the children of his brothers and sister payable on the expiration of the annuities. The settlements were expressly declared to be subject to the charges created by these deeds.

Held, that the property which passed on the death of A, so as to be subject to estate duty, consisted of the hereditaments comprised in the settlements, diminished by the value of the annuities and sums in gross; and that these annuities and sums, although created without money consideration, were not incumbrances in respect of which allowance was prohibited by s. 7, sub-s. 1 (*a*), of the Finance Act, 1894 (2).

Earl Cowley v. *Inland Revenue Commissioners,* [1899] A. C. 198, applied.

Per Cherry L.C.J., s. 7, sub-s. 1, of the Finance Act, 1894, applies only to unsettled or free property passing, on death, by will or intestacy.

Held also, that the annuities and sums in gross should be valued actuarially, subject to the provisions contained in the several deeds creating them.

PETITION by Francis Charles, Baron De Freyne, under sect. 10 of the Finance Act, 1894.

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(1) Before CHERRY L.C.J. and GIBSON J.

(2) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property real or personal, settled or not settled, which passes on the death of such person a duty called 'estate duty.' . . .

s. 7 (1). "In determining the value of an estate for the purpose of estate duty, allowance shall be made for reasonable funeral expenses, and for debts and incumbrances; but an allowance shall not be made (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest."

Arthur, fourth Baron De Freyne, was seised in fee-simple, subject to incumbrances amounting to £57,000, of certain hereditaments in the counties of Roscommon and Sligo. He had five brothers and one sister, and on the 21st November, 1876, he demised the lands to trustees for a term of 500 years upon trusts to be declared in six several deeds, and subject thereto upon trust to allow the rents and profits to be received by said fourth Baron De Freyne, his heirs, and assigns. By six deeds, all dated the 22nd November, 1876, it was declared that the trustees should hold the term of 500 years upon trust to raise six annuities of varying amounts, £2150 in all, to be paid to the brothers and sister of the fourth Baron De Freyne during their respective lives, each of the annuities being reducible to a lesser sum in the event of the annuitant becoming bankrupt or attempting to assign or incumber his or her interest in the annuity; and upon further trusts to raise six sums in gross of varying amounts, £38,000 in all, on the death of each annuitant, as portions for his or her children who being sons should attain the age of twenty-one or being daughters should attain that age or marry. All these deeds were voluntary deeds.

Upon his marriage with Lady Laura Octavia Dundas, the fourth Baron De Freyne put the lands in settlement by a deed dated the 6th February, 1877. Under this settlement he took a life estate, and then, subject to certain charges and portions, the property was limited to the first and every other son of the marriage successively in tail male. This settlement was subject to the annuities and sums in gross already mentioned. He was empowered to mortgage, and did in fact mortgage, the property to the extent of £5000 for his own use.

There were issue of the marriage two children, namely, Arthur Reginald French, the fifth Baron, and one daughter, who died under the age of twenty-one.

Lady Laura Octavia Dundas, otherwise De Freyne, died in 1881, and in 1882 the fourth Baron married Marie Georgiana Lamb. By a deed dated the 27th September, 1882, he charged the lands with a jointure payable to his wife should she survive him, and portions for the children of the marriage. There were ten children of this marriage, of whom Francis Charles, sixth Baron De Freyne, the petitioner herein, was the eldest.

On the 11th July, 1901, the fourth Baron and his son, Arthur Reginald, afterwards the fifth Baron, joined in a re-settlement of the property, subject to the annuities and sums in gross. Arthur Reginald was given £100 a year during the joint lives of his father and himself. The property was then limited to the fourth Baron for life, in restoration and by way of confirmation of the life estate limited to him by the settlement of the 6th February, 1877, with remainder to Arthur Reginald for life, with remainder to his first and other sons in tail male, and in default of such issue, to the fourth Baron and his heirs.

In 1906 the property was sold under the Irish Land Purchase Acts, the residue of the purchase-money, after payment of the incumbrances for £57,000, amounting to £130,923 15*s*.

Arthur Baron De Freyne died on the 22nd September, 1913, having by his will, dated the 5th August, 1901, devised all the hereditaments limited to him in fee-simple in remainder as aforesaid to the use of the petitioner for life, with remainder to his first and every subsequent son successively in tail male. Upon the death of the fourth Baron, Arthur Reginald French, the fifth Baron, entered into possession and enjoyment of the property as tenant for life in possession under the limitations in the re-settlement of the 11th July, 1901.

On the 9th May, 1915, the fifth Baron was killed in action in the present war. He left no issue, and on his death the petitioner succeeded as sixth Baron, and became entitled to the settled property as tenant for life under the re-settlement of 1901 and the will of Arthur, fourth Baron De Freyne.

All the brothers and the sister of the fourth Baron De Freyne were living. Some of the brothers had attempted to incumber their annuities, whereby these had become reduced. Four of the brothers and the sister had married, and had issue living.

In the account presented by the petitioner to the Commissioners of Inland Revenue he claimed that the property in respect of which estate duty was to be assessed was the property comprised in the re-settlement of 1901, subject to the term of 500 years, and diminished by the annuities and sums of money in gross charged by the six deeds of 1876. He capitalized the annuities at £20,526 17*s*. 8*d*., added thereto the sums in gross £38,000, and the mortgage of £5000—in all £63,526 17*s*. 8*d*.; and subtracting

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these sums from the purchase price of the property (£130,923 15*s.*), he submitted that the principal value of the settled property that passed on death was £67,396 17*s.* 4*d.* The Commissioners of Inland Revenue disputed the principle upon which the accounts were framed. They accepted the figure of £130,923 15*s.*; but they required that the annuities and sums in gross should be claimed as deductions from the settled property that passed, which they determined to be £130,923 15*s.* They refused to allow any deductions in respect of the sums in gross, and required that the principal value of slices of land of an annual value equal to the annuities should be deducted in respect of the annuities, intimating that claims for duty would arise on the cesser of these annuities. The deductions allowed by them in respect of the annuities and the mortgage for £5000 came to £50,310, and on this basis they claimed estate duty on £80,613 15*s.*

The prayer of the petition was as follows:—

"1. That the said several annuities and sums in gross created by the six several indentures of November 22, 1876, do not, nor did the said term of 500 years for securing the same created by the said indenture of November 21, 1876, pass on the death of the said Arthur Baron De Freyne, and that the same were not, nor were any of them, any part of the settled property so passing, and cannot be added thereto for the purpose of assessing the duty.

"2. That the 'principal value' of the settled property passing on the death of the said Arthur Baron De Freyne within the meaning of the Finance Act, 1894, and Acts amending the same, is the principal value of the property in the said settlement of February 6, 1877, and re-settlement of July 11, 1901, and no more, that is to say, the hereditaments therein comprised diminished by or *cum onere* of or subject to (inter alia) the value of the said several annuities and sums in gross, and the said term of 500 years for securing the same, and the Commissioners are not entitled to swell the estimate of such settled property by adding to it the value of the said term of 500 years, and the said sums in gross secured by the said term.

"3. That the Commissioners are in error in their decision that the account should be framed on the basis that settled property to the value of the said sum of £130,923 15*s.* passed on the said death and that any diminution of the said sum claimed by the accounting party must be claimed as a deduction authorized by the statute to be made from the settled property passing on such death.

"4. That the Commissioners are in error in their claim that the sums in gross charged by the indenture dated November 21st, 1876, and six indentures dated November 22nd, 1876, or their value, passed on the death of the said Arthur Baron De Freyne, or that the account of the settled property that passed on such death must be swelled by the addition thereto of such sums in gross.

"5. That the Commissioners are in error in their method of valuing the life annuities, and that such annuities should be valued by actuarial calculation in the way in which life annuities are ordinarily valued."

In their answer the Commissioners of Inland Revenue submitted:—

"1. (*a*) That the property comprised in the settlement of February 6th, 1877, and July 11th, 1901, or the capital moneys representing the same, passed on the death of Arthur Baron De Freyne, and are liable to estate duty under sect. 1, or under sub-sect. 1 (*b*) of sect. 2, of the Finance Act, 1894. (*b*) That in determining the value of the estate which passed for the purpose of estate duty no allowance can be made for either the annuities or for the sums in gross charged on the estates by the six deeds dated respectively November 22, 1876, as they are incumbrances created by the deceased otherwise than for full consideration in money or money's worth, and as such any allowance in respect of them is prohibited by sub-sect. 1 of sect. 7 of the Finance Act, 1894. That the aforesaid incumbrances did not diminish or affect the quantum of the estate that passed, or of the interest which ceased, on the death of Arthur Baron De Freyne, and therefore no allowance can be made in respect of them in arriving at the value for assessment of the duty on the death of Arthur Baron De Freyne. (*c*) By way of alternative, that a slice of such property sufficient to produce annuities payable at the date of death of the deceased under the aforesaid six deeds must be deemed not to have passed on the death of Arthur Baron De Freyne by virtue of sub-sect. 3 of sect. 5 of the Finance Act, 1894, and allowance should therefore be made in respect of such slice in arriving at the basis for assessment of the estate duty payable.

"2. If, contrary to what they believe and contend, an allowance should be made in respect of the capital charges aforesaid, (*a*) the amount claimed by the petitioner is excessive, and the correct principle on which to arrive at the amount in respect of which allowance should be made is to apportion the capital charges between the notional slice sufficient to produce the annuities, and the residue of the property, and then to ascertain the value at the date of death of the share of the capital charges apportioned to such residue, and (*b*) that under no circumstances can an allowance be made for the entire of such capital charges, but only for the value thereof calculated as of the date of the death of Arthur Baron De Freyne."

Meredith K.C. (with him *Hugh Kennedy*), for the petitioner:—

The question is whether the taxable property includes or excludes the annuities and sums in gross charged upon the estate by the fourth Baron in 1876. Our contention is that what was settled is alone the taxable property, and that the annuities and sums in gross, being paramount to the settlement, are not included in what passed on death. What property was settled by the settlements of 1877 and 1901? Was it the £130,000 odd, or was it the difference between that sum and the value of the annuities and the sums in gross charged by the deeds of 1876? The petitioner says that the difference alone was settled, and that the difference alone is taxable under sect. 1 of the Finance Act, 1894. *Earl Cowley* v. *The Commissioners of Inland Revenue* (1), in which it was held that in the case of mortgaged property only the equity of redemption passed and was liable to duty, is an authority in support of this proposition. As in *Cowley's Case* (1) the mortgage diminished the value of the property before re-settlement, so here the term of 500 years, the annuities, and the sums in gross, not only were not part of the settlement, but they diminished the value of the property before settlement. The Commissioners have no right to swell the property comprised in the settlement by including items which formed no part whatever of that property.

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(1) [1899] A. C. 198.

If the difference alone was what was settled and what passed, no question of allowances for incumbrances arises, since the incumbrances are not upon the property put in settlement, but are paramount to and apart from it.

It is, I submit, settled by *Cowley's Case* (1) that sect. 7 (1) (*a*) of the Finance Act, 1894, has no application to settled property; that it applies only to free property. The opening words of sect. 7 are: "In determining the value of an estate for the purpose of estate duty." It deals with the ascertainment of value, not with the question as to what property passed and was liable to taxation. It enacts that an allowance shall be made in certain cases for debts and incumbrances; it makes an exception to that provision; and, further, it makes an exception to that exception. The section says: "Allowance shall be made for reasonable funeral expenses and for debts and incumbrances." The funeral expenses and the debts of the deceased—the tenant for life—could not affect the settled estate. A remainderman is not liable for the funeral expenses and debts of the tenant for life. As to the "allowance for incumbrances," this must mean incumbrances affecting the property passing and in respect of which no allowance could be made but for sect. 7, sub-s. 1. But if the incumbrances of the tenant for life could not affect the settled property—the difference which alone was settled and passed—then this provision cannot be relevant; and if the main provision be irrelevant, the exceptions thereto cannot apply. My argument that sect. 7, sub-s. 1, applies only to free property was practically admitted by the Crown in *Attorney-General* v. *Montagu* (2). [He referred also to *Montagu's Case* in the House of Lords (3); *Attorney-General* v. *Richmond* (4); and *Colquhoun's Trustees* (5).]

The Attorney-General (*J. H. Campbell K.C.*), and *The Solicitor-General* (*James O'Connor K.C.*) (with them *Edmund Coll*), for the Commissioners of Inland Revenue:—

The clear and avowed intention of sect. 1 of the Finance Act, 1894, is to treat all property, settled or not settled, on the same basis. An estate duty is levied, "save as hereinafter expressly provided," by that section on the principal value, "ascertained as hereinafter provided," of all property passing on the death of the deceased. In *Cowley's Case* (1) the words in the section just quoted were omitted from all consideration. It is impossible to assess the duty by regard solely to sect. 1, because by its very terms the value must be ascertained in accordance with subsequent provisions, including obviously sect. 7. The latter section is, in fact, comprised in a part of the Act headed, "Collection and Recovery of Estate Duty." No question under sect. 7 arose in *Cowley's Case* (1), because the incumbrances there were admittedly for good consideration. If the contention of the petitioner is correct, it means that his method of calculation is simply a device by which estate duty may be evaded. Sect. 7 is a clear declaration that no deduction is to be made in respect of incumbrances and charges which are voluntary and without full consideration in money or money's worth.

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(1) [1899] A. C. 198.
(2) [1903] 1 K. B. 483, at p. 487.
(3) [1904] A. C. 316.
(4) [1909] A. C. 466.
(5) [1913] Sess. Cas. 874.

Cowley's Case (1) did not expressly decide that sect. 7, sub-s. 1, has no application to settled property. That may be the logical result of the decision; but as it was not put upon that ground, this Court is entitled to decide the matter for itself. All the observations in that case concerning settled property are merely dicta. When *Montagu's Case* (2) was considered subsequently, the Lords had an opportunity of saying that sect. 7, sub-s. 1, was confined to unsettled property, but they refrained from saying so. Lord Atkinson in *The Attorney-General* v. *Richmond* (3) gives an elaborate explanation of what sect. 7 was intended to do; and it never occurred to him that it was only applicable to free estate. He treats it as applicable to all property.

Hugh Kennedy in reply:—

As to the suggestion that evasion might take place by creating annuities and charges, it must be remembered that the Finance Acts have provided for every possible contingency. Eventually every fragment as it passed through different channels would be hit. It is notable that what is dealt with in sect. 7, sub-s. 1, is

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(1) [1899] A. C. 198.

(2) [1904] A. C. 316.

(3) [1909] A. C. 466, at pp. 478, 479.

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not individual property, but "estate"; and the deductions referred to are *in pari materia.* Sect. 1 specifies the items which when aggregated make up an estate, and sect. 7, sub-s. 1, prescribes the method of valuing an estate as distinguished from the items, and deductions which are properly estate deductions are there allowed. Sub-sect. 5 of sect. 7 prescribes the method of valuing the individual items that are aggregated in the estate. In *Cowley's Case* (1) one of these items was the equity of redemption; here it is the settled property subject to the charges.

Cur. adv. vult.

June 15.

CHERRY L.C.J.:—

This is a petition under the Finance Act, 1894, against the decision of the Commissioners as to the amount of duty payable on the death of Arthur, fourth Baron De Freyne, in respect of certain settled property comprising hereditaments in the counties of Roscommon and Sligo (or capital moneys representing the same) of which the deceased was tenant for life under a settlement dated the 6th February, 1877, and a re-settlement dated the 11th July, 1901.

Prior to the execution of the settlement of 1877, namely, on the 21st November, 1876, the deceased, who was then seised in fee simple of these lands subject to incumbrances amounting to £57,000, conveyed the lands to trustees for a term of 500 years upon trusts which were subsequently declared in six deeds, all dated the 22nd November, 1876. These six deeds provided life annuities of varying amounts, and gross sums payable on the expiration of the annuities, for the brothers and sisters of Arthur, fourth Baron De Freyne, and their issue. The total amount of the annuities was £2150 per annum, and of the gross sums charged on their expiration, £38,000. These deeds were all voluntary deeds, there being no consideration for same other than love and affection. The settlement of 1877, made on the occasion of the marriage of the deceased, and the re-settlement of 11th July, 1901, are both made expressly subject to the charges created by these deeds; and the deeds themselves are fully recited in both settlements. It is unnecessary for me to refer to them more in detail, as their purport is fully set out in the petition.

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(1) [1899] A. C. 198.

The net question for our decision is whether or not the taxable property passing on the death of the deceased includes or excludes the value of the annuities and sums in gross charged upon the lands under the several deeds of the 21st and 22nd November, 1876. On the one hand, the petitioner contended that these charges are paramount to the settlement, and formed no part of the settled property. They did not therefore, he submits, pass, actually or constructively, on the death of the deceased. On the other hand, the Commissioners contend that these charges did not diminish or affect the quantum of the estate which passed on the death of the deceased; and that in determining the value of the estate which passed, for the purpose of calculating the estate duty, no allowance should be made for these charges, as they are incumbrances created by the deceased for no consideration in money or money's worth; and that, as such, any allowance in respect of them is prohibited by sub-section 1 of sect. 7 of the Finance Act, 1894.

Mr. Meredith, in his able argument before us on behalf of the petitioner, relied mainly, if not entirely, upon the decision of the House of Lords in the case of *Earl Cowley* v. *The Inland Revenue Commissioners* (1). That case clearly establishes that where property subject to mortgages is put in settlement, and the mortgages are paramount to the settlement, on the death of a tenant for life under the settlement, only the equity of redemption passes to the remainderman; and that in ascertaining the value of the property for the purpose of calculating estate duty under the Finance Act, the value of the mortgages must be deducted from the gross value of the lands as if unincumbered.

But does the principle of the decision of the House of Lords in *Cowley's Case* (1) extend to the case of a settled estate, where the incumbrances were not created for good consideration in money or money's worth, but were purely voluntary? That is a difficult question to answer. Were it not for the 7th section of the Finance Act, 1894, I should certainly think that it did. Voluntary incumbrances, such as family charges, when paramount to the settlement seem to me to be excluded from the settlement just in the same way as mortgages for cash. But what effect is then to be given to sect. 7, sub-s. 1 (*a*), of the Finance Act? If sect. 7, sub-s. 1, applies to settled estates at all, it seems to assume that voluntary charges, when created by the deceased, do pass on the death of a tenant for life as part of the settled estate, and it prohibits any allowance being made in respect of them. The only way in which, as far as I can see, the decision in *Cowley's Case* (1) can be reconciled with sub-sect. 1 of sect. 7 is by holding that the operation of this sub-section is confined to unsettled property. There is a good deal to be said in favour of this view, though there is no definite statement to that effect in any of the judgments in the House of Lords. Lord Halsbury merely says (p. 205) that sect. 7 "is only applicable to the mode of determining the value of an estate whatever that estate is." Lord Davey is more vague. "All the learned judges," he says, "in both courts below, except perhaps Rigby L.J., have agreed that sect. 7, sub-sect. 1, applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances" (p. 221). He does not say whether he adopts or rejects this view, which would appear to confine the operation of the section to free or unsettled property. He merely adds: "That sub-section is not an easy one to construe, and I am not satisfied that I have quite mastered the meaning of it, but I do not think that it applies to the present case."

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(1) [1899] A. C. 198.

On the whole, after much hesitation, I have come to the conclusion that the view put forward on behalf of the petitioner in this case is the correct one, and that the sub-section only applies to unsettled or free property passing, on death, by will or intestacy. This view is supported by the opening words of the sub-section, which provide for an allowance for funeral expenses and debts generally. Such allowances cannot, of course, apply in the case of settled property. The remainderman has nothing to do with funeral expenses or debts, unless the latter are incumbrances upon the settled property.

If this be the true construction of the sub-section, it gets rid of all difficulty. *Cowley's Case* (1) becomes an absolute authority in favour of the petitioner's contention that a deduction should be made in respect of these annuities and capital sums from the value of the estate passing to the remainderman. This view appears to me to be consistent with natural justice. It would be very unjust to require the remainderman to pay estate duty upon these annuities and charges, from which he does not and cannot derive any pecuniary benefit whatever.

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(1) [1899] A. C. 198.

For these reasons I am of opinion that the petitioner is entitled to the declarations asked for in the petition.

As to the method of calculating the value of the life annuities, I am also of opinion that the view put forward by the petitioner is correct. This value, in my opinion, should be ascertained, as of the date of the death of deceased, by actuarial calculation, in the way in which the value of life annuities is usually calculated.

Gibson J.:—

Two questions have been argued. The first is:—What property passed on the death of Lord De Freyne on September 22nd, 1913? Mr. Meredith contends that what property passed depends on the settlements of February 6th, 1877, and July 11th, 1901, which were subject to the paramount charges created by the deeds of November 22nd, 1876; that what was settled was the residue of the property after deducting the value of such charges; that the charges cannot be taken into account as affecting, for the purposes of the Finance Act, the settled property; that sect. 7, sub-s. 1, does not apply to settled property so circumstanced; and that *Lord Cowley's Case* (1) is conclusive in favour of the petitioner. The Attorney-General answers that sect. 1, which is subject to express exceptions, directs that "principal value" is to be ascertained as thereinafter provided; that whether property is settled or unsettled the prescribed valuation must be followed so far as applicable; that the present facts come with sect. 7, sub-s. 1; and that *Cowley's Case* (1), although logically applicable, is distinguishable in its circumstances.

But for the guidance afforded by the House of Lords' decisions, the problem would be difficult. The deeds of 1876 were pro tanto an alienation of the fee. Had Lord De Freyne, instead of settling the property, devised it by will or left it to descend to his heir, the whole estate would have passed, not merely his beneficial interest, and no allowance could have been made for the charges. The definition of settlement in sect. 22 is wide, and extends to voluntary settlements, between which and marriage settlements not for money's worth there is, for finance purposes, no distinction : *Attorney-General* v. *Smyth* (1). Suppose A, having created by deed a charge, makes a settlement reserving to himself a life interest, why should the particular mode in which he disposes of his beneficial interest make a fundamental difference between a will and a deed as regards computation of principal value? The Attorney-General urged that extensive evasion of the Act could be carried out if his construction was not adopted. The point, however, is, whether this taxing legislation extends to the present facts. Does the case come within the letter of the law? Lord Cairns says :—" If the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be": *Partington* v. *The Attorney-General* (2); see also *Northumberland* v. *Inland Revenue Commissioners* (3). What does the Act profess to cover? What is the true effect of the exposition in *Cowley's Case* (4)? That case differs from the present in two particulars—(1) There were two joint disponers; (2) the charges were mortgages. Here, there was the same disponer in all the deeds, and there was no money consideration. In *Cowley's Case* (4), if there had been one disponer instead of two, the result would have been the same: Lord Watson at p. 208.

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(1) [1899] A. C. 198.

Cowley's Case (4) decides that—(1) a joint mortgage partly for the benefit of one and partly of another, creating a paramount charge on the fee, is not an incumbrance on the equity of redemption put in settlement which could be the subject of allowance or disallowance under sect. 7, sub-s. 1; (2) that sect. 1 was the governing section, and that value could only be considered in reference to what property passed; (3) that what passed under the settlement was to be determined by that instrument and not by previous deeds of incumbrance. No opinion was expressed as to the effect of sect. 7, sub-s. 1, but Lord Davey describes, at p. 221, all the judges below as agreeing that it applies only to the case of an estate of a deceased owner subject to his debts and incumbrances. In the Court of Appeal (1) Collins L.J. says that the enactment only applies to "deductions from estates which actually pass and which form assets for the payment of the deceased's debts." The case deals only with an overriding charge; but it was subsequently held that a mortgage by a tenant for life and a tenant in remainder imposing a liability on the fee, and reducing the settled estate to an equity of redemption, might come within the same rule: *Attorney-General* v. *Hawkins* (2); *Montagu's Case* (3). Lord Davey had expressed his opinion on the point in *Cowley's Case* (4) (see p. 219), with which compare Lord Watson's view (see p. 206).

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(1) [1905] 2 I. R. 553.
(2) L. R. 4 H. L., at p. 122.
(3) [1911] 2 K. B., at pp. 358, 359.
(4) [1899] A. C. 198.

After some fluctuation of opinion, I have come to the conclusion that the reasoning in *Cowley's Case* (4) applies; that the settlement of 1877, long before the Act of 1894, must be taken to limit what property passed on the death of Lord De Freyne in 1913; that the charges under the deeds of 1876, antecedent to the settlement, cannot be considered as incumbrances within sect. 7, sub-s. 1, notwithstanding that they were created without money consideration and imposed by the disponer creating the settlement, on whose death the property passed. The charges and terms of years onerated the fee quite as much as if there had been a mortgage. In *Cowley's Case* (4) portion of the mortgage debts was for the benefit of the third Earl, and such portion was outside sect. 7, sub-s. 1. I interpret the reasoning of the case as confining the operation of sect. 7 to the state of things existing under the settlement, without regard to antecedent incumbrances, whether created by third parties or by the settlor, whatever the nature of such incumbrances, whether mortgages or family

(1) [1898] 1 Q. B. 355, at p. 382.

(2) [1901] 1 K. B. 285.

(3) [1904] A. C. 316.

(4) [1899] A. C. 198.

charges. Whether the charge antecedent to the settlement has been created by a distant ancestor or by the settlor in the shape of a mortgage or a charge under a settlement on a first marriage or by a voluntary deed, what actually passes in every case is the beneficial interest apart from the antecedent incumbrances.

I express no concluded opinion on the exact operation of sect. 7, sub-s. 1, which has been taken by some judges and text writers as inapplicable to the case of the death of a tenant for life of a settled estate. Lord Davey, in the passage at page 221, does not purport to dissent from this view, which the reference to funeral expenses and debts would tend to support.

The second point argued (which would not arise if we acceded to the main argument of the Attorney-General) was as to the valuation of the capital sums and annuities under the deeds of 1876. The capital sums are subject to contingencies, and must be valued in reference to such contingencies estimated as at the death of Lord De Freyne. As to the life annuities, also subject to contingencies, I think it would be most convenient to value them at a bulk sum, and not in the special mode put forward by the Crown, though the difference in result may be small.

It was agreed by counsel that the Divisional Court was the proper tribunal to hear and decide this appeal.

The following are the material portions of the order made by the Court:—

The Court doth declare that the several annuities and sums in gross, and the term of 500 years securing the same, created by the Indenture of the 21st November, 1876, and the six several Indentures of the 22nd November, 1876, in the petition mentioned, formed no part of the property comprised in the settlement of the 6th February, 1877, and re-settlement of 11th July, 1901, in the petition mentioned; and that the property comprised in such settlement and re-settlement, that is to say, the hereditaments therein diminished by the value of the said annuities and sums in gross, and no more, passed on the death of Arthur, fourth Baron De Freyne, and became subject to duty.

And the Court doth further declare that the said annuities and sums in gross should be valued actuarially, subject to the provisions contained in the said several indentures.

Solicitors for the petitioner: *A. O'Hagan & Son.*

Solicitor for the Commissioners of Inland Revenue: *R. Martin.*

C. L.

K. B. Div.
1914.
Nov. 5, 6.
Appeal.
1915.
Feb. 8, 9.
Nov. 8, 9, 10.
1916.
Feb. 8.

GAFFNEY *v.* THE DUBLIN UNITED TRAMWAYS CO., LTD.

Accident—Personal Injuries—Negligence—Contributory Negligence—Direct Cause of Accident—Possibility of Defendant's avoiding the Accident by Exercise of reasonable Care—Accident due to Result of joint Negligence of Plaintiff and Defendant.

The plaintiff, a partially deaf man, in crossing a thoroughfare was knocked down and injured by a tram-car. The driver, previous to the accident, sounded the gong and shouted, but did not slacken speed. The jury found that the plaintiff was negligent in not keeping a proper look-out, but that the driver by reasonable care could have avoided the consequences of the plaintiff's negligence. They also found that the accident was not directly caused exclusively by the negligence of the plaintiff, or exclusively by the negligence of the driver, but was directly caused by the negligence of both concurrently; and they assessed a sum for damages.

Held by the Court of Appeal (reversing the decision of the King's Bench Division), that on the findings of the jury the plaintiff was entitled to judgment for the damages assessed.

MOTION for judgment or a new trial.

The action was brought by the plaintiff to recover damages for personal injuries caused by the alleged negligence of the defendants' servants. The defence included a plea of contributory negligence. The action was tried before Kenny J. and a special jury of the City of Dublin on the 6th June, 1916. The following summary of the material evidence is taken from the judge's report:—

The plaintiff, a partially deaf man, was, between 9 and 10 o'clock on the night of 3rd January, 1914, knocked down and injured in Sackville Street, Dublin, near to the Parnell Monument, by a tram-car coming from Nelson's Pillar. The plaintiff, a man of seventy years of age, swore that he never saw the tram-car at all before being knocked insensible. Hayden, a hackney car-driver, stated that he saw the plaintiff crossing the street. He reached the first rail, and kept walking across the road, head downwards. The car was coming from Nelson's Pillar at about six miles an hour. The driver shouted "hey, hey, hey!" several times, but no gong was sounded. The driver did not slacken speed until the plaintiff was on the ground. The left side of the front portion of the car struck the plaintiff above the hip. On cross-examination the witness stated that the car was about two lengths distance from the plaintiff when the driver began shouting. Byrne, the driver of the tram-car, stated that he drove the car slowly up Sackville Street, and was about three yards from the spot where the plaintiff was struck when he first saw him. He had sounded the gong before seeing the plaintiff, and continued to sound it, and also shouted at the plaintiff, who immediately struck against the car. When he saw the plaintiff first he had his head down, and paid no attention. He pulled up when the plaintiff was struck. Boden, an eye-witness, stated that he saw the plaintiff step off the footpath, and walk right in front of the tram; and that the driver could not have avoided the accident.

The following questions were submitted to the jury, the answers to which are annexed:—

"1. Was the driver of the tram-car negligent—(*a*) as to rate of speed? Answer, 'No'; or (*b*) as to not keeping a proper look-out? Answer, 'No.' (*c*) Not sounding the gong? Answer, 'No'; or (*d*) not slackening speed? Answer, 'Yes.'

"2. Was the plaintiff negligent when approaching the tram-car, and, if so, was it not in keeping a proper look-out? Answer, 'Yes.'

"3. If the plaintiff was negligent, could the tramway driver, by reasonable care, have avoided the consequences of such negligence? Answer, 'Yes.'

"4. Was the accident directly caused (*a*) exclusively by the plaintiff's negligence? Answer, 'No'; or (*b*) exclusively by the negligence of the tram driver? Answer, 'No'; or (*c*) by the negligence of both concurrently? Answer, 'Yes.'

"5. If you find for the plaintiff, assess damages. Answer, £20."

Upon these findings the jury, by the direction of the judge, found for the defendants, and judgment was entered for the defendants with costs.

The judge reported that had he been trying the case without

K. B. Div. 1914. GAFFNEY v. D. U. T. Co.

a jury, he would, without hesitation, have found that there was no negligence of any sort on the part of the driver of the car, and that the occurrence was caused wholly by the plaintiff's negligence.

The plaintiff applied to the King's Bench Division that the judgment in the action should be entered for him, or in the alternative, for a new trial.

C. S. Campbell, for the plaintiff.

Serjeant Sullivan K.C., *Gordon K.C.*, and *Collins*, for the defendants.

PALLES C.B. :—

If the case had come before us without any application to set aside the findings upon the third question, the Court would have been in a great deal of difficulty, because in that event the verdict would have been inconsistent with itself. It would have been found in answer to the third question that the defendants could, by the exercise of reasonable care, have avoided the consequences of the plaintiff's contributory negligence, and then, as against that there would be the answer to the fourth question (*c*) that the accident was directly caused by the negligence of both concurrently. These two findings would have been diametrically opposed, and, therefore, to keep the record right we allowed the defendants to apply to set aside the answer of the jury to the third question.

In my opinion the settled law in reference to contributory negligence is this: if an injury is the direct result of two acts, the negligence of the defendants, and the negligence of the plaintiff, the latter cannot recover. A number of adjectives have been used in describing the connexion between the negligence and the injuries; but there is no word which more closely identifies the injuries with the negligence than the word "direct," and I look upon it as settled law that the plaintiff cannot recover in this Court if the injuries are the joint result of these two acts. In the present case it has been found that the accident was directly caused by the defendant's negligence and the plaintiff's negligence, both concurrently, and irrespective of any of the cases cited, and without placing the slightest reliance upon *Reynolds* v. *Tilling* (1),

(1) 19 T. L. R. 539.

my view is that, upon the settled law, if the answer to the third question is set aside, the plaintiff cannot recover.

What are we to do with this third question? It appears to me that upon the entire questions submitted by Mr. Justice Kenny to the jury, they find that the injury to the plaintiff was the direct result of those two concurrent acts, and I prefer that finding to the rather metaphysical answer given to the third question, because I do not see—those two negligent acts being concurrent, and the direct cause of the accident—where there is room for any intervening cause, and therefore I am of opinion that the answer to the third question ought to be set aside, and that the judgment for the defendants should stand.

Madden and Boyd JJ. concurred.

C. L.

The plaintiff appealed to the Court of Appeal (1).

C. S. Campbell, for the plaintiff, contended that, having regard to the answer of the jury to the third question, the plaintiff was entitled to judgment. In the alternative, he claimed a new trial of the action.

The Attorney-General (*Gordon K.C.*) and *Serjeant Sullivan K.C.* (*Collins* with them) for the defendants, contended that they were entitled to judgment on the findings. The cases cited are mentioned in the judgments.

Cur. adv. vult.

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(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ. The case had been argued on the 8th and 9th February, 1915, before O'Brien L.C., and Moriarty and Ronan L.JJ. Owing to the death of Moriarty L.J. before judgment had been delivered, it was re-argued before the present Court.

Appeal.
1916.

GAFFNEY
v.
D. U. T. Co.

Feb. 8.

SIR IGNATIUS J. O'BRIEN L.C. :—

This case comes before the Court on an appeal from an order of the King's Bench Division entering judgment in the action for the defendants, the Dublin United Tramways Company. It was argued before this Court twice. The necessity for the second argument arose from the lamented death of Moriarty L.J., before judgment had been delivered; and accordingly Lord Justice Ronan and I have had the advantage of hearing the case re-argued. It would be only common justice to say that on the occasion of each argument the case was presented by Mr. Campbell, the counsel for the appellant, with great erudition and clearness, and in a manner which showed his entire appreciation of the difficult law relating to this question of negligence. As to the learned Attorney-General and Serjeant Sullivan, the counsel for the respondents, their position at the Bar renders it unnecessary to say anything more than that, as one would expect, they on their side have assisted the Court as far as it was possible for counsel to do.

With regard to the general principles of law involved in the present case, although there was much discussion, I did not understand that counsel on either side argued that the present case involved any new departure, as I conceive it does not. The difficulty which the case presented to my mind was whether the findings of the jury were not, having regard to the questions, so inconsistent that a new trial should be directed; but speaking with the greatest respect of the judgment of the Lord Chief Baron, I have not been able at all to agree with the view that defendants were entitled to have a verdict entered for them; and I conceive that the trouble which arises in the present case has its origin in attributing to the word "directly" a fixed and peculiar technical meaning which I do not think it has at the present state of development of the law relating to negligence.

This particular case is one of a class popularly spoken of as "running-down cases," where a man attempting to cross the street in one of the principal Dublin thoroughfares was struck by a tramcar and injured.

There is a sentence in a judgment of Holmes L.J., when sitting in the King's Bench, in *Smith* v. *Browne* (1), which, to my mind in clear and popular language, but with that legal accuracy which one finds in all his pronouncements, aptly describes this class of case. He says, at p. 5:—" In actions of this kind the law is the same, whether the damage has been caused by a locomotive on a railway crossing, a hansom in Fleet Street, or a wagon on a country road; and cases differing widely in their circumstances may be resorted to for the exposition of legal principles. Beyond this, however, they afford little guidance, and there is no more fruitful source of fallacy than when a judge, in dealing with the case before him, lays down that a particular act or omission amounts to negligence, to seek to apply his language to a similar act or omission occurring in other circumstances and under different conditions. The only test of due precaution is what would be done by a reasonable man in a given state of facts; and it is obvious that the degree of care taken by such a person will vary with time and place."

Now the judge includes in that category the case of locomotives on railway crossings. It was suggested in the course of the present argument that such cases form a kind of sub-division. No doubt, owing to the exceptional position of railway locomotives and coaches using railway lines, and the peculiar circumstances which must attend that user, having regard to public requirements and conveniences as regulated by statute, there will be in most instances essential practical differences between cases of running down by railway locomotives and running down in streets; but even in the former case, whether accidents occur at stations, at railway crossings, or in connexion with the shunting of carriages in goods depots, this fundamental principle remains: that even in the case of engines on railways, if a driver sees a man in a position of danger, and if he can, by the exercise of reasonable skill and care, avoid killing him or maiming him, and does not take the precautions which will avoid such killing and maiming, he may be guilty of actionable negligence. I quite agree that in ninety-nine out of a hundred cases such precautions cannot be taken, and the plaintiff fails; but the reason, as I apprehend, that Holmes L.J.

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(1) 28 L. R. Ir. 1.

includes that class in his general collection of cases in which people may possibly be run down is that the principle none the less exists, though its application may in most cases be practically eliminated when the accident occurs on a railway line.

The question of liability for negligence in the varied conditions of life must always be a difficult one for the lawyer; but I venture to suggest that the difficulties are somewhat enhanced by the fact that the law has been gradually evolved through the operation of judicial decisions, and during this process of evolution opinions are expressed and language used which have had afterwards from time to time to be overruled or qualified; and confusion arises by not bearing in mind that words have in some reported cases strict meanings given to them which if adopted in connexion with later decisions may obscure the law in place of making it clear.

There was first the hard common law notion that if a plaintiff was himself guilty of negligent conduct in any way contributing to the accident he could not recover. The harshness and injustice of such a doctrine was at a very early stage perceived, and it was found absolutely essential that some qualification should be made to so unreasonable a proposition. In, however, laying down the law with regard to negligence, the judges were practically constrained to accept this early doctrine, while qualifying it in such a way that it would not do gross injustice. The result is now in its ultimate binding form to be found, I take it, in the judgment of Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (1), in which the matter is dealt with in the form of first stating (p. 759) the general proposition, "that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But," he continues, "there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Lord Penzance in his speech avoids in that passage the use of the word "directly." In continuation he says, "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (1), supported in that of *Tuff* v. *Warman* (2), and other cases, and has been universally applied in cases of this character without question."

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(1) 1 A. C. 754.

Having regard to this positive statement of Lord Penzance, agreed in by Lord Cairns, who said that he concurred with every word of Lord Penzance's judgment, and also having regard to the judgments of Lord Blackburn and Lord Gordon, it would be affectation for me at this stage to re-dissect the case of *Tuff* v. *Warman* (2), but it is necessary to refer to one matter in connexion with the latter case, because the respondents' case has been pressed most strongly on a supposed technical meaning of the word "directly" as found in the fourth question submitted to the jury, and it is very helpful to see how this word was used and understood in that case. For a long time there seems to have been much difficulty experienced in inventing a formula which would not only express the law, but which when stated to a jury would be so simple that even a jury could understand it. This formula was, I think, found in *Tuff* v. *Warman*. In the charge of Willes J. to the jury in that case, in putting the questions he used the word "directly," and the form he adopted does seem to have given Williams J. some little difficulty, but the whole of the Court took the direction to the jury as meant to be taken and, of course, understood by the jury, in the sense of the three questions which, as I have stated, form now the regular formula employed in dealing with this class of case. Willes J. said, "If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but, if you think that the defendant by his negligence directly caused the injury, you must find for the plaintiff." Williams J., in dealing with this charge, said: "It was further objected that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might by exercising ordinary care and diligence have avoided the accident. *It seems to me that that was in effect left to them.*" Therefore we find that this word "directly," which was undoubtedly employed by Willes J. in his charge to the jury, was not intended by him, or understood by him or by the judges who sat with him on the new trial motion, to mean anything inconsistent with a direction that if they thought the defendant might by the exercise of ordinary care have avoided the accident the plaintiff could recover.

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(1) 10 M. & W. 546.

(2) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

I shall now refer to *Coyle* v. *Great Northern Ry. Co.* (1), and it is particularly useful as containing a very full judgment of the Lord Chief Baron in connexion with this very question. There, a workman of the defendants placed himself in the way of carriages which were being shunted, and under such circumstances that he must have thoroughly appreciated his danger when he placed himself in the position of danger. The carriage went over him, and he was killed. There was no engine or engine-driver. The Lord Chief Baron in that case first stated the law as he understood it in a case where there was no evidence that the defendants could by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence, and then he dealt with the law as applying in cases where there was such evidence. In this judgment, and in all his judgments on this branch of the law dealing with actionable negligence in running-down cases, he uses the words "directly contributing," in describing the plaintiff's negligence, as embodying the state of the law applicable to the facts of the particular case which prevented the plaintiff from recovering.

Once the Lord Chief Baron's view, and his employment of the words "directly contributing," are appreciated, all difficulty, I conceive, is removed. The Lord Chief Baron says (p. 416): "If it" [the negligence of the plaintiff's husband] "directly contributed, it is sufficient for the defendants' case; and, in that event, it would be immaterial whether it was the sole cause, or only one of several causes. As the accident could not have happened unless the plaintiff were, at that particular moment, on that portion of the line, his negligence in being there is at least a *causa sine qua non* of his death. Whether it was a *causa causans* depends on this—Was there a neglect on the part of the defendants of anything, whereby the consequences of the plaintiff's negligence might have been prevented?" He uses the words "directly contributing," as I understand his judgment in that case, subject to the qualification I have been referring to. I cannot help suggesting that the use of the expressions "*causa causans*," "effective cause," "proximate cause," and the many other expressions employed in different cases, can generally, and had better, be avoided, requiring, as they do, further explanation. At the same time, I am not for one moment to be taken as suggesting that there may not be cases in which the judge, properly explaining the case to the jury, may find it convenient to use some particular form of expression. I wish to say nothing which would look like hampering the probably greater intelligence and experience of other judges. I merely wish to emphasize the fact that the law as laid down in *Tuff* v. *Warman* (1), and as enunciated by Lord Penzance, is the law of the land, is couched in simple language, and is easily enough understood. At any rate, I think it is the best we have got.

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(1) 20 L. R. Ir. 409.

Effect cannot be given to the ultimate clause in a case like *Coyle* v. *Great Northern Railway Co.* (2), where the accident arose entirely from the plaintiff's own negligence, and could not have been avoided by any act which under the circumstances the defendants could reasonably be required to have done; but that arose from the special facts of that case. The words of the Lord Chief Baron on this subject in *Coyle's Case* (2) are quite clear; he says (p. 419): "Is there, then, evidence of such negligence on the part of the defendants as, but for it, the consequences of the plaintiff's negligence might have been obviated. . . . I hold that it has not been shown that it would have been at all possible for the engine-driver—if an engine-driver had been there—to pull up the train so as to avoid the accident." Therefore, it is perfectly obvious that the reason why the Lord Chief Baron thought that there should be a verdict entered for the defendants in that case, was because there was no evidence at all, good, bad, or indifferent, which would have shown that the defendants could, by the exercise of reasonable care and caution, have avoided the consequences of the negligence of the plaintiff in walking in front of the moving carriage.

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(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(2) 20 L. R. Ir. 409.

Coyle's Case (1) shows how conveniently all cases of the "running-down" class, whether in the street, or arising from shunting operations, or on a level crossing, can be brought under the rule in *Tuff* v. *Warman* (2); and whether it be a motor-man driving an electric motor along lines, or a motor not on lines, if, although there is negligence on the part of the plaintiff, the result can be avoided by reasonable care and caution on defendant's part, he is bound to exercise that reasonable care and caution, and he cannot, as was said in *Davies* v. *Mann* (3), deliberately run over the man on the highway because he is asleep or drunk.

I only wish to add one more word with regard to the use of the word "directly." The Lord Chief Baron in the present case uses the same expression. He uses the word "directly" in the technical sense which he has explained in *Coyle* v. *The Great Northern Railway Co.* (1). I have already pointed out that even in *Tuff* v. *Warman* (2) the word "directly" was introduced, and that although used in the sense of the Chief Baron in many cases, not only ordinary individuals, but judges, may employ it also in cases where unquestionably the defendants are, or may be, liable by reason of their not having taken the necessary precautions to avoid the consequences of the plaintiff's negligence. An instance may be found in *Grand Trunk Railway* v. *McAlpine* (4). Lord Atkinson, in pointing out an erroneous statement of a colonial judge with regard to the English law of negligence, says: "There is no such rule of law in England as that if a person about to cross a line or lines of railway looks both ways on approaching the track, he need not look again just before crossing it. Neither is it true, as the learned judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary, a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shown that the defendant could, by the exercise of ordinary care and caution on his part, have avoided the consequences of the plaintiff's negligence." I do not think that Lord Atkinson intended to lay down any new principle of law in that proposition, or that he did do so. He used the word "directly" not in a peculiar technical sense, in which in some of the cases it may have been employed, but in a general sense, and the sense is this—the plaintiff is guilty of negligence; it is the duty of the defendant in running-down cases, if he can do so by the exercise of reasonable care, to avoid running down the plaintiff, and it is for a jury to say whether he could or could not have avoided doing so.

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(1) 20 L. R. Ir. 409.

(2) 2 C. B. N. S. 740; 5 C.B.N.S. 573.

(3) 10 M. & W. 546.

(4) [1913] A. C. 838, at p. 845.

In the present case, as I have said, there was not, I think, any dispute between counsel as to what the law is. The Attorney-General based his argument, as I understood him, on the proposition that, accepting the law as it stands, there was no evidence entitling the jury to have answered the third question in the manner they did. If there was such evidence, and if the matter had not been confused by the introduction of the fourth question, I did not understand the Attorney-General to contend that the plaintiff ought not to succeed, but he urged, with great force and persuasiveness, the view, that the jury had no evidence before them on which they were entitled to act in finding the answers in favour of the plaintiff as they did. Now, eliminating for a moment the series of questions contained in No. 4, the jury had put to them, in substance, the three questions which, having regard to the authorities, will, it seems to me, try all cases of this class. [His Lordship referred to the questions put to the jury, and continued.]

The learned judge thought it better to put each question in connexion with a concrete incident of negligence and actual acts alleged in the evidence to have occurred. Whether that was the best plan, or whether the question put in *Butterly's case* (1) is not better, I express no opinion. In substance the first question was—"Was the driver negligent?" They found that he was not negligent in the matter of stopping, or looking out, or in sounding the gong, but that he was negligent in not slackening speed, i.e., he was guilty of negligence contributing to the accident.

(1) [1907] 2 I. R. 134.

In cases of street accidents a man may be driving a vehicle under conditions that, speaking generally, are not negligent. A man suddenly puts himself in a position of danger. Then the question arises whether the driver of the vehicle could, by the exercise of reasonable skill and care, avoid killing or maiming the man. I think that this case was regarded by the jury from that point of view, and I cannot say they were wrong in doing so. Regarding it from that point of view, they found that there was negligence on the part of the driver in not slackening his speed; they also found in answer to the question—was the plaintiff negligent in approaching? "Yes"; and to the question, whether if the plaintiff was negligent the driver could have avoided the accident, they answered "Yes."

I now look at the evidence to examine it, in the only light I am entitled to examine it in on a new trial motion. The learned judge who tried the case considered, and so reports, that the accident was due altogether to the plaintiff's own negligence. He says, "I would without hesitation have found that there was no negligence of any sort on the part of the driver of the car, and that the accident was caused solely by the plaintiff's negligence." That is a view of the case which it was open to the jury to have adopted if they had acted on the evidence of the driver of the tram-car. They might have come to the conclusion that it was impossible for the driver to have avoided the accident, and that the accident was caused entirely by the plaintiff's own negligence; but they did not, as I apprehend their verdict, adopt the evidence of the driver at all; and it is important to my mind to remember that the case insisted on by the driver, and the case suggested by Sergeant Sullivan during the argument, namely, that of what is in some of the cases called "simultaneous negligence," are not the same. The case of the defendants as put by their witnesses was this, that the driver could stop in the length of the car, and did so stop, and that he sounded his gong, but that when the man walked into the car the driver could not avoid touching him. The case of the defendant company then, so far as their witnesses were concerned, was that the accident was altogether the plaintiff's fault; that they could have done nothing in the terms of the third question; and that, therefore, the plaintiff could not recover.

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That would have been the opinion of Kenny J., as he says, if he had been trying the case without a jury. It might have been my own opinion, I do not know, because one cannot form an opinion without seeing the witnesses. I cannot intrude myself into the functions of the jury, and whatever may be said as to their answers to these questions, they certainly were not of opinion that the accident was caused solely by the plaintiff's own negligence. Was there evidence as to the first three questions on which the jury could legitimately found their conclusions of fact? To my mind I should be usurping the functions of the jury if I were to say that there was not. The jury, as I have pointed out, regarded the case, rightly as I think, as one where possibly the driver in going along the tracks was not conducting himself, with regard to the traffic generally, in a negligent way. But they clearly, I think, formed this opinion of the evidence, that the driver of the tram-car, when the car was at a distance of at least two car lengths away, observed that the plaintiff was going to put himself into a position of danger by crossing the tram-lines, and they thought it was not sufficient for the driver merely to sound his gong, and shout "hey, hey, hey!" but that he could have prevented the impact by slackening speed; he did not do so, taking his chance that shouting "hey, hey," would be sufficient to warn the man; it was not sufficient, and the collision took place.

Referring again to the case of *Smith* v. *Browne* (1), it would be difficult to find language more apt in dealing with such a case as the present than the words there used by Holmes J. There, as in the present case, the injured man seems to have been deaf, and probably did not hear the shouting of the driver, who had attempted to direct the attention of the man crossing the street to his danger, but failed to do so. Holmes J., at pp. 6–7 of the report, says: "Assuming, however, negligence on the part of the plaintiff, the question still remains whether Enright took reasonable care to prevent its consequences. The observations of judges in cases where accidents have occurred on level railway-crossings have no application in actions like the present. Where a person, without looking out for an approaching train, steps upon a railway line, and is run down by a locomotive before he has cleared the rails, his negligence is almost necessarily final and conclusive. The engine-driver has neither time nor room to take any steps to prevent the catastrophe. But it is quite different with street traffic. We see every day in the busy parts of cities attempts, generally successful, made by drivers to save the heedless and unwary; these efforts are the burden of a cabman's life, and would make his occupation almost too exciting for existence, were it not for the safety-valve provided in the rich communicative vocabulary with which nature has endowed him. The negligence of a foot-passenger, however great it may be, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to prevent its consequences. This is, indeed, admitted by counsel for the defendant, but they argue that Enright fulfilled his obligation by giving a warning shout. The Solicitor-General contends that a driver is entitled to assume that his warning will be attended to, and that it is only when he sees that it has not been heard that he is bound to pull up. No doubt, this may be so when there is time for the successive processes. But what is to happen if the driver only first observes the danger when there is barely time to stop his horse? Is he to go on trusting to the chance that his voice will be heard, and that the heedless man will have sufficient presence of mind to take the precise course by which the danger can be avoided. In the present case it is admitted that Enright saw the plaintiff's risk when he was somewhere between three to seven yards distant from him. The jury might reasonably infer that he could have then pulled up, and Smith would have been safe. The defendant seems to me to be upon the horns of a dilemma. He either had time after he noticed that his warning was not heard to stop his horse, in which case he ought to have done so; or, when he saw the plaintiff, there was no time for the two-fold process, in which case he ought not to have trusted to the shout alone."

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(1) 28 L. R. Ir. 1.

Now, the Attorney-General, with that clearness which always characterizes his arguments, endeavoured to draw a distinction between that case, and *Tuff* v. *Warman* (1) on the one side, and

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(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

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the present case on the other, because, he said, in *Tuff* v. *Warman* (1) there was plenty of fair way owing to width of the river allowing by proper steering of avoidance of collision, but that a man driving a tram-car is confined to the lines on which the tram runs, and so is in a different position. It is in this connexion that, I think, the judgment of the Chief Baron in *Coyle's Case* (2) is of such value. There, too, we have got the very condition of things which the Attorney-General relies upon as differentiating the present case from *Tuff* v. *Warman* (1). In *Coyle's Case* (2) the Court entered a verdict for the defendants because the third part of the formula could not be applied—there was no evidence justifying consideration of the possible avoidance of accident by the defendants; but the Chief Baron distinctly mentions the possibility of a condition of things where the engine-driver—if there had been an engine-driver—could have avoided the consequences of the plaintiff's negligence, and he does not suggest in any way whatsoever that the action might not under such circumstances lie. Although the decision in *Smith* v. *Browne* (3) is not one of this Court, I conceive that the statement of the law there made by Holmes J. is not only accurate but the essence of common-sense. Apply it to the present case, where we find a similar condition of things. When two tram-car lengths away the driver shows by his shouting that he appreciates that this deaf man is in a position of danger. He takes his chance, merely calling out and sounding the gong; but that is not successful. If he had stopped, the accident would not have happened. Was he bound to stop, or was he entitled to go on? The law says that in such cases he may be bound to stop, and the jury have found that in the circumstances of this particular case he ought to have stopped.

If the case rested on these first three findings, it would not present any difficulty to my mind; but from the commencement of the case I have been pressed with the difficulty arising from the fourth set of questions, coupled with the introduction into them of the word "directly." The jury were asked, "Was the accident directly caused," etc. [His Lordship referred to the questions put to the jury and the answers thereto, and continued]:—They accordingly have eliminated the possibility of accepting the tram-car driver's evidence to the effect that the accident arose altogether from the fault of the plaintiff. They have also eliminated the alternative that it arose altogether from the fault of the defendant. Now comes the trouble. Was it caused "by the negligence of both concurrently"? Answer, "Yes." I have been at some pains to show that if there is evidence from which the jury can reasonably infer that, although there was negligence on the part of the plaintiff contributing to the accident, yet the defendant may be liable for not exercising reasonable care and precaution if by doing so he could have avoided the consequences of the plaintiff's negligence, once that is found, once the three questions I have dealt with are answered in the way that they are legitimately, as I consider, answered here, there is either no room for this further question, whatever it means; or, as the Lord Chief Baron seems to think, the finding to the latter is diametrically opposed to the prior findings. The Chief Baron took this course, in which, with all respect, I cannot agree, namely, that the finding of the jury on the third question must be disregarded. It cannot, however, be so disregarded if there was evidence to support the finding, as, in my judgment, there was.

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(1) 2 C.B.N.S. 740; 5 C.B.N.S. 573.

(2) 20 L. R. Ir. 409.

(3) 28 L. R. Ir. 1.

If I do not then disregard it, am I to adopt the plan the Lord Chief Baron adopted, when he thought there was evidence to support the finding as to No. 4 and none as to No. 3? Am I to disregard No. 4, and act on 1, 2, and 3? This is the point in the case which has given me the chief trouble. It has been argued by Serjeant Sullivan that the finding on 4 (*c*) establishes this as one of the class of cases which is sometimes described in the text-books as "simultaneous negligence," whatever that may be,—that it was a case analogous to *Tilling's Case* (1), and that the jury had found accordingly substantially in favour of the defendants. The Chief Baron seems to consider that because the jury have answered the further questions as they did, therefore it was a case in which one was as much to blame as another, and that, accordingly, no cause of action had arisen.

Whether you use the word "directly," or whether you do not, if you eliminate mere words, and look at the substance of the matter, and consider that the jury understood the substance, once the third question is answered in favour of the plaintiff this theory of "simultaneous negligence" is out of the case, because you cannot have "simultaneous negligence" where there is a possibility—a reasonable possibility—of the defendant, by the exercise of reasonable care and skill, avoiding the consequences of the plaintiff's negligence. I cannot, I think, hold that the jury were simply playing fast and loose with the situation, that they were answering one set of questions one way, and the other set another way, and producing contradictory findings.

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(1) 19 T. L. R. 539.

I think it is my duty to reconcile the verdict of the jury if I can do so. As I have already pointed out, they clearly did not consider that this was a case in which the accident was caused solely by the plaintiff's own fault, and when they answered the further questions in the fourth set in this way, I conceive the jury thought that they were reiterating what they had already found, namely, that both the plaintiff and the defendant were guilty of negligence, and nothing more. I think that to get at a solution of the verdict we must take all the answers, not construing them to produce contradiction but to establish agreement if it reasonably can be done. I do not want to be drawn into a discussion of this question of simultaneous negligence, as it has been called, supposed to be contained in the fourth set of questions. In my, perhaps limited, view I rather conceive that those first three questions are quite sufficient to try any case of "running down," and that if the jury answer No. 3 in favour of the plaintiff that will, humanly speaking, satisfy all the requirements both of law and common sense, if there be evidence to support such findings.

I cannot but think that this second set of questions, which caused an exactly similar difficulty in *Ivory's Case* (1), may, in future cases of the same kind, cause like uncertainty in verdicts. At the same time I do not think it would be at all right for me to dictate to judges what form of questions they should adopt, and indeed any suitable form of questions, if rightly explained, and intelligible, will suffice; but for my part, I cannot, any more than could Pigot C.B., in *Doyle* v. *Kinahan* (2), conceive three questions more suitable to try cases of this kind than the three questions settled by *Tuff* v. *Warman* (1). In *Doyle* v. *Kinahan* (2), Pigot C.B. uses these words (at p. 159) :—"According to the report of the case of *Walton* v. *The London, Brighton, and South Coast Railway Company* (3), Mr. Justice Willes is reported as stating the first part of the rule in *Tuff* v. *Warman* (1), without adding the material qualification with which it concludes. But that he adopts the entire, is plain from his reference to the passage cited from Addison on Wrongs, which contains that qualification. 'With the law so laid down,' he says, 'except in the use of the word "could" instead of "would," it would be difficult to quarrel.' It does not always happen that the terms in which a judge is authorized or required by law to direct a jury can be easily accommodated to the language of pleading. One of the advantages of the rule in *Tuff* v. *Warman* (1) is, that it is framed in terms so clear, and at the same time so succinct, that it can be easily so accommodated." I agree that it can be accommodated to the language of pleading, and to the questions to be put to the jury, and in my judgment it places, so far as a layman can possibly understand it, the law with regard to contributory negligence in running-down cases on a clear and intelligible basis.

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(1) Unreported. C. A. 1913, June 17.

(2) I. R. 4 C. L. 150.

I wish to add a few words with regard to the decision in *Butterly* v. *Mayor, &c., of Drogheda* (4). That was a case where the defendants had placed a heap of stones on the highway, and the plaintiff, with his eyes open, drove into the stones and was injured. Lord O'Brien did, in that case, make use of language suggestive of the contention that where, as he conceived was the case in *Reynolds* v. *Tilling* (5), the accident was caused directly by the negligence of both plaintiff and defendant, the plaintiff could not recover. *Butterly's Case* (4) was, however, so far as this Court was concerned, really a very simple case. Lord O'Brien himself did not lose sight of the third question in *Tuff* v. *Warman* (1), but he clearly did not consider that there was any scope for it in the case before him. He says (p. 144)—"What did the corporation omit to do in what has been described as the 'agony of the collision'? What were they to do? The plaintiff ran upon the heap of stones. That was *his* negligence. What were they to do to avoid the consequences of that? In the agony of the collision they could have done nothing." I think that the judgment of Lord O'Brien is to be regarded in the light of the facts of the case before him, in which there was not a shred of evidence that by the exercise of any care and precaution whatever (except that of not having left the stones where they did) the defendants could have avoided the accident. The judgments of the Court of Appeal are not reported, but it has been suggested that as they affirmed the judges below they in some way affirmed a view of the law which, to my mind, would be a novel one. That, however, cannot be so. Wright J. (at p. 149) says:—" Our attention has been called since the hearing to a reported case of *Reynolds* v. *Tilling, Ltd.* (1), in which it was apparently considered that this third finding could not qualify, or take from, the effect of the second finding, and that the second finding, notwithstanding the third, entitled the defendant to a verdict. With the utmost respect I can hardly think this is so. If the jury in this case or any other case found, on proper evidence, that the defendants could, by the exercise of care on their part, have saved the plaintiff from the consequences of his own want of care, I think the plea of contributory negligence would fail, because in the result the accident was not owing to the plaintiff's negligence, but to the final negligence, as found by the jury, of the defendants, who could have saved the plaintiff from his own want of care." I have read the Registrar's notes of the judgments of this Court, and I find that there is no foundation for the suggestion made here that the Court of Appeal in any way set up through the medium of *Reynolds* v. *Tilling, Ltd.* (1) any new doctrine with regard to the law of contributory negligence.

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(1) 2 C.B.N.S. 740; 5 C.B.N.S. 573.

(2) I. R. 4 C. L. 150.

(3) 1 Har. & Ruth. 430.

(4) [1907] 2 I. R. 134.

(5) 19 T. L. R. 539.

In the present case there is scope for this third question, and the answer has been found in favour of the plaintiff. I must reconcile this whole series of questions by holding that the true view of the verdict of the jury—who were apparently ordinary men struggling with technical language—is that they did not

(1) 19 T. L. R. 539.

consider their answer to No. 4 inconsistent with that to No. 3. I would not blame them for thinking they were answering the questions in the same way notwithstanding the introduction of the word "directly"; and, as I have pointed out when referring to Lord Atkinson's judgment in *Grand Trunk Railway* v. *McAlpine* (1), the use of the word "directly" in a general sense in connexion with the negligence of a plaintiff, does not preclude the possibility of a finding that the defendant by the exercise of reasonable care could have avoided the consequences of such negligence.

For these reasons I conceive that the judgment of the King's Bench Division entering judgment for the defendant should be set aside, and that the appellant is entitled to succeed.

RONAN L.J.:—

This was the first case that came before me as a judge. I have frequently reconsidered it since it was first argued, as I felt most anxious not to be driven to a conclusion different from that of Kenny J. and the judges in the King's Bench Division, as I thought, and still think, that they were much more likely to be right than I. My excuse for the excessive length of this judgment is that I wish to show that I only arrived at the result after the most careful consideration of the authorities. Indeed, I may say that the judgment, long as it is, forms but a small part of what I have from time to time written on the case.

In this case a partly deaf old man, in attempting to cross a street, was knocked down by a tram-car coming up the street at a reasonable speed. The man was guilty of grave negligence, as he admitted that he never noticed the car until it struck him. There was nothing to prevent him seeing the car if he had exercised care. His negligence continued up to the happening of the accident.

Under these circumstances, in the ordinary use of the words, there can, I think, be no doubt that his negligence was "partly the cause of the accident"; that it "contributed directly to it"; that "it was partly his fault"; that "he was partly to blame for it." Now, if, under these circumstances, the tram-driver, seeing the risk, could have slackened speed or pulled up and avoided the accident by the exercise of ordinary care, there can be no doubt again, in the ordinary sense of the words, that his negligence was "partly the cause of the accident"; that it "contributed directly to it"; that "it was partly his fault"; that "he was partly to blame for it." Further, I think there can be no doubt again, in the ordinary sense of the words, that in such a case the accident was "the result of the negligence of both"; that "both were in fault"; that "both were to blame"; that "the negligence of both directly contributed to the accident, and the negligence of both directly caused it."

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(1) [1913] A. C., at p. 815.

Under these circumstances, if by the exercise of ordinary care the driver could have pulled up and avoided the accident, and was guilty of negligence in not having done so, can the plaintiff recover? If not, a tram-driver can with impunity run down a careless man whom he sees trying to cross in front of the tram, when ordinary care requires the tram-driver to pull up to avoid striking him. Serjeant Sullivan, counsel for the Company, to whom I put this question on the first argument, said that as the plaintiff's negligence continued up to the happening of the accident, it was *a direct* cause of the accident, and that it was settled by authority that this was a defence to the action; and I take it that he contended, therefore, that although the tram-driver saw the danger, and reasonable care required him to pull up, and although he could have thereby avoided the accident, the defendants were not liable in the action, i.e. the driver could with impunity refrain from pulling up.

In these days of motor-cars, motor-buses, taxi-cabs, &c., this is an appalling proposition; but there are statements of the law in the cases, which, if their language is read in its ordinary sense, go a very long if not the whole way to sustain this argument. I take Lord Blackburn's statement of the law in *Cayzer* v. *Carron Co.* (1): "Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident, neither shall recover at all, and it shall be just like inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into hotchpot and divided between the two."

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(1) 9 A. C. 873, at p. 881.

In *Butterly* v. *Mayor, &c., of Drogheda* (1), Lord O'Brien C.J. says:—"Another case with which we used to be very familiar in our younger days is *Doyle* v. *Kinahan* (2). There there was a disagreement between Fitzgerald B. and Deasy B. on the one side and Pigot C.B. upon the other, the majority of the Court laying down the rule thus: 'That which alone can entitle the plaintiff to recover is that the defendant's default was the *entire* cause of the injury.' Here no one can say that the defendant's default was the entire cause."

The judgment of the King's Bench Division in this case contains similar expressions. The Lord Chief Baron says:—"In my opinion the settled law in reference to contributory negligence is this: If an injury is the direct result of two acts, the negligence of the defendants and the negligence of the plaintiff, the latter cannot recover . . . there is no word which more closely identifies the injuries with the negligence than the word 'direct,' and I look on it as settled law that the plaintiff cannot recover in this Court if the injuries are the joint result of these two acts."

These statements, if taken in their ordinary sense, certainly seem to support the defendants' contention. However, contrast them with the following explicit statement of the law by Lord Atkinson delivering the judgment of the Privy Council, Lords Haldane, Dunedin, Atkinson, and Moulton, in *Grand Trunk Railway* v. *McAlpine* (3): "Neither is it true, as the learned judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary, a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shown that the defendant

(1) [1907] 2 I. R. 134, at p. 141.

(2) I. R. 4 C. L. 150.

(3) [1913] A. C., at pp. 845, 846.

could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence."

Again: "The negligence of a foot passenger, however great it may be, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to prevent its consequences": per Holmes J. in *Smith* v. *Browne* (1).

The two latter statements seem absolutely opposed to the former, yet I do not think it was really denied in the argument before us that the two latter accurately state the law at the present day. The old propositions are still repeated, but in their ordinary sense they have become legal fictions.

Even in *Tuff* v. *Warman* (2), it is stated that the question was, "whether the damage was occasioned *entirely*" by the defendant's negligence. How absolutely incorrect this is at the present day is conclusively shown by what has occurred in the present case.

In a judgment I had prepared after the first hearing of the case, I wrote the following:—"It is obvious that if these statements" (those first mentioned above) "are correct in their ordinary sense, there is only one question in an action such as this is, i.e.—Was the accident (directly) caused exclusively by the negligence of the tram-driver? A negative answer would be a clear verdict for the defendants. This question here was left with the word 'directly' and answered by the jury: 'No'; and from the beginning to the end of the case it was never referred to by anyone either in this Court or in the judgment in the King's Bench Division. It is hard to conceive a more complete proof that at the present day these statements are not in their ordinary sense real statements of the existing law."

Towards the end of the second argument Lord Justice Molony referred to this, but the defendants' counsel did not rely on it even then. In my opinion, this old fiction of "sole cause" and "entire cause" lies at the root of all the trouble in the present case. The practical effect of holding that if the plaintiff contributed to the accident the defendant was relieved from liability, would have been so disastrous that the Courts were driven to explain away by the help of fictions the statements to this effect. This finally

(1) 28 L. R. I. 1, at p. 7 (1891).

5 C. B. N. S. 573, at p. 585.

reached the stage that if it were proved that the defendant by the exercise of ordinary care could have avoided the consequences of the plaintiff's negligence, the latter was not to be deemed in law (*a*) part of the cause of the accident, or (*b*) as contributing to it; although in fact it was part of the cause, and in fact it did so contribute, but that in such a case (*c*) the defendant's negligence was to be deemed in law the sole cause of the accident or, as it is well put in Marsden on Collision (4th edition, p. 24), "although there was contributory negligence in fact, there was none in law."

The cases I have mentioned speak of "cause" without any adjective or adverb, but the means by which the Courts got rid of the "sole cause" fiction was by limiting the meaning of the words "cause" and "contribute" by adjectives and adverbs.

In *Doyle* v. *Kinahan* (1), Pigot C.B. speaks of "the vague and varying terms in which juries appear to have been directed, and in which the opinions of judges and even the decisions of the Courts in Banc, were conveyed in several of the reported cases." He mentions the following, and cites the authority for each:—"Contribute" simply, "contribute and conduce," "conduce," "contribute or conduce." "Sometimes," he says, "the plaintiff has been stated or dealt with as deprived of the right to recover by his own negligence, when the injury has been 'attributable in any way to it' or 'has been occasioned in any way by it' or when he has been 'in any degree in fault.' Sometimes it has been said that the negligence of the defendant, to render him liable, must be the *direct* cause; sometimes that it must be the *entire* cause; . . . sometimes the test applied has been, that the negligence was the *proximate and immediate* cause; sometimes . . . the *proximate* cause or *causa causans*." I may add to this list Baron Fitzgerald's terms in *Scott* v. *Dublin and Wicklow Railway Co.* (2), at p. 400: "In some degree, the proximate cause, or contributory to the proximate cause."

In this case of *Scott* v. *Dublin and Wicklow Railway Co.* (2), Pigot C.B. said, at p. 392: "I own it appears to me that, to adopt a form of direction which would involve jurors in such a discussion as an ingenious advocate could raise upon the theory of causation, and the distinction between remote and proximate causes—a subject which has perplexed metaphysicians from the days of the disquisitions of the schoolmen to those of the essays of Hume and of Brown"—(I may add from a recollection of my own college days, "and from those until those of the Logic of John Stuart Mill": see Book III, chap. 5)—"would not tend to convey clear and satisfactory instruction to men of plain understandings and of ordinary information." He then (p. 393) refers to the judgment in *Tuff* v. *Warman* (1), saying, "that judgment lays down the rule to be applied in such cases" . . . "translating the rule in reference to 'proximate' and 'direct' causation into the following plain, familiar, and unambiguous language." He then cites the familiar passage.

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(1) I. R. 4 C. L. 150, at p. 157.

(2) 11 I. C. L. R. 377.

I shall now give a few instances of the clear recognition of the fiction; but as the first case I refer to is of great importance, I must deal with it in detail.

Dowell v. *The General Steam Navigation Co.* (2) was decided in 1855, three years before the judgment of the Exchequer Chamber in *Tuff* v. *Warman* (1). It was a case of collision between a steamer and a collier, tried before Erle J. I think sufficient attention has not been paid to his direction to the jury in that case. It was as follows:—"If there was negligence on the part of the plaintiffs as well as on the part of the defendants which led to the collision, the plaintiffs could not recover, if the defendants could not have avoided the accident by reasonable care and skill; and even supposing there had been negligence on the part of the collier, still if the steamer could, by ordinary care and skill, have avoided the collision, the defendants would be answerable." This admirable direction, avoiding adjectives and adverbs and even the word "cause" itself, was admitted on both sides to be correct, and so taken by the Court. Sir William Erle left three questions to the jury, which with the answers were as follows:—1. "Was there negligence on the part of the plaintiffs with respect to the light which led to the collision? Answer, There was fault on the part of the collier [plaintiffs] in not continuing the light till the danger was past. 2. Could the defendants have avoided the collision by ordinary care and skill? Answer, It is the opinion of the jury that the steamer [defendants] was going at too great a speed on so dark a night, in which respect there was want of caution; but that it was impossible to have avoided the accident when the steamer was within two or three of the collier's [plaintiff's] lengths. 3. Was the damage occasioned by the accident the result of circumstances for which more blame attaches to the one side than the other? Answer, We are much inclined to think the preponderance of blame to be with the steamer [defendants]." On these answers, the judge entered the verdict for the plaintiffs. There was then a notice of motion to enter it for the defendants, and the course of the case shows the confusion arising from the attempt to preserve the old fiction of "sole cause" with the real statement of the law contained in the direction. In the course of the argument, Sir F. Thesiger said:—"Lord Tenterden used always to tell the jury that, in order to find a verdict for the plaintiff, they must be of opinion that the accident was occasioned by 'the mere negligence of the defendant' (which is the old form of declaration), and that they could not find such verdict if the negligence of the plaintiff had contributed to the accident." Lord Campbell, intervening, said: "He used, however, always to make them understand that this was said of negligence actively contributing to the accident."

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(1) 5 C. B. N. S. 573.

(2) 5 E. & B. 195.

In giving judgment, Lord Campbell referred to the "very full exposition of the law upon the subject by the learned judge at the trial, which is admitted to have been perfectly correct." He further said:—"We think that the jury must be taken to have found that this fault (of the plaintiffs) led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the Court of Admiralty, in the case of a collision, if both vessels are in fault the loss is equally divided; but in a court of common law the plaintiff has no remedy if his negligence *in any degree* contributed to the accident. *In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and in these cases the question arises, whether the defendant by the exercise of ordinary care and skill might* *have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case: Davies* v. *Mann* (1). *There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss.* But in the present case the jury appear to have concluded that the negligence of the master of the collier . . . directly contributed to the accident, although there was negligence on the other side, and the 'preponderance of blame' was 'with the steamer.' . . . The answer to the third question is unequivocally unfavourable to the plaintiffs. The preponderance of blame is with the steamer [defendants]. The jury . . . think that there was blame on both sides, by which the accident was occasioned; and, this being so, it is immaterial, with regard to the verdict, whether the preponderance of blame was with the steamer or the collier." The verdict was entered for the defendants.

Tuff v. *Warman* (2) was a case of collision on the Thames. It was tried before Willes J., who gave the jury an elaborate direction, based on "remote," "proximate," "direct," "cause of," and "contribution to the accident." See 2 C. B. N. S., pp. 742–743. The case came before the Common Pleas as to misdirection. At p. 756 Cresswell J. adopts the passage I have italicized in Lord Campbell's judgment in *Dowell's Case* (3). The important judgment, however, is that of Williams J. (pp. 757–758). He says:—"But then comes the question, What is meant by the negligence of the plaintiff being proximately or directly contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. . . . I feel great difficulty in dealing with the question whether the negligence was proximate or remote; and I certainly feel great difficulty in getting rid of that question of law by leaving it to the jury. That, however, was the course adopted in the case of *Dowell* v. *The General Steam Navigation Company* (3) (not by Erle J., but by the Court), and followed by my brother

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(1) 10 M. & W. 546.
(2) 2 C. B. N. S. 740; 5 C. B. N. S. 573.
(3) 5 E. & B. 195.

Willes upon this occasion. I will not attempt to controvert or dispute the propriety of that now, however much I may lament that the law is not on a more intelligible and satisfactory footing in this respect. It was further objected that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might by exercising ordinary care and diligence have avoided the accident. It seems to me that that was in effect left to them." Willes J. concurred. *Dowell's Case* (1) was in the Queen's Bench; *Tuff* v. *Warman* (2) in the Common Pleas. In the Exchequer, in 1853, in *Morrison* v. *The General Steam Navigation Company* (3) the jury were told that "the plaintiff was bound to exhibit a light under the Admiralty regulations, and that if by not doing so he had himself contributed to the accident, the plaintiff was not entitled to recover." At p. 738 Pollock C.B. said:—"The point I left to the jury involved the question whether the plaintiff himself did not contribute to the accident by his own carelessness." . . . "And if it could clearly be made out that a vessel having no light had been run down by another from sheer carelessness and negligence in not keeping a good look-out, we agree . . . in thinking that in such a case the plaintiff would have had a right to compensation from the defendants." . . . "The point was, therefore, left to them" (the jury) "substantially involving the law as it stood before the statutes and still is, namely, that if the conduct of the party complaining has either occasioned the loss, or has contributed to the occasioning the loss," he cannot recover.

The judgment of the Exchequer Chamber in *Tuff* v. *Warman* (2) was evidently the result of the judgment of Williams J. Is the final clause of the statement in *Tuff* v. *Warman* (2) to be read in its ordinary sense? If so, it is apparently inconsistent with the earlier part of the statement. At p. 586 the attempt to reconcile them is thus made:—"If the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff would not be *the direct cause* of the injury, that is to say, would not be a cause without which the injury would not have happened." This may not be very satisfactory as a logical reconcilement, but it clearly establishes the final proposition as law, and means in plain English that if the defendant, in fact, saw the plaintiff and could have avoided him by reasonable care, the negligence of the plaintiff in not seeing the defendant will not prevent him from recovering. This is the point of the present case.

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(1) 5 E. & B. 195.

(2) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(3) 8 Ex. 733.

It is interesting to know, as pointed out by Pigot C.B. in *Doyle* v. *Kinahan* (1) at p. 158, that in the subsequent case of *Walton* v. *The London, Brighton, and South Coast Railway Co.* (2), Willes J., referring to *Tuff* v. *Warman* (3), observes that the question whether the negligence of the plaintiff "was the direct cause of the accident, or proximately contributed to it," is "obviously a question which is likely to be put in such a form as to perplex a jury; and the operation of causes is a most difficult subject to deal with." The whole of the remarks of Pigot C.B. on pp. 158–159 should be read.

In 1869, in *Doyle* v. *Kinahan* (1), at p. 153, FitzGerald B. said:—"I do not think it can be understood that the plaintiff's negligence would, *as a cause*, have *contributed*, with the defendant's negligence, to the injury, if the defendant might, by the exercise of ordinary care on his part, have avoided the *consequence* of such neglect." . . . "That which alone can entitle the plaintiff to recover is, that the defendant's default is the entire cause of the injury." In the same case Pigot C.B. explains "occasioned entirely" in *Tuff* v. *Warman* (3) thus (p. 156):—"The Courts . . . appear to have considered that the mischief is caused *entirely* by the defendant's negligence in either of two cases: either where the plaintiff does not at all contribute to the cause of the mischief by his own neglect; or where he does so contribute, but where also a part of the defendant's negligence, which caused the mischief, consisted in the want of ordinary care, by which he might have avoided, in the occurrence or transaction complained of, the consequence of the plaintiff's negligence.

In *Coyle* v. *Great Northern Railway Company* (4), Palles C.B.

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(1) I. R. 4 C. L. 150.

(2) Har. & Ruth., pp. 429, 430.

(3) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(4) 20 L. R. Ir. 409, at p. 417.

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says:—"Whether it" (the plaintiff's negligence) "was a *causa causans* depends on this—was there a neglect on the part of the defendants of anything, whereby the consequences of the plaintiff's negligence might have been prevented?"

Again, in *M'Donnell* v. *The Great Southern and Western Railway Company* (1), Palles C.B., delivering the judgment of the Exchequer Division, says:—"The plaintiff's negligence is not, however, sufficient to entitle the defendants to a verdict. For that purpose there must have been not only negligence, but negligence contributory to the injuries complained of, that is, it must have been a *causa causans* of those injuries, and the judgment of the majority of this Court in *Doyle* v. *Kinahan* (2) is conclusive, at least in this Court, that it cannot be such *causa causans*, if the defendants, by the exercise of due care and caution, could have avoided its consequences."

In *Davey* v. *The London and South Western Railway Company* (3), Brett M.R. says:—"It is for the plaintiff to show that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident." Here "would not" plainly means, would not in point of law, although it did in fact. This was after the decision of the House of Lords in *Radley's Case* (4).

In *The Bernina* (5), Lord Esher M.R. says (Rule 5):—"If, although the plaintiff has himself, or by his servants, been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoer might, by reasonable care, have avoided the accident, the plaintiff can maintain an action against the defendant." Rule 6: "If the plaintiff has been personally guilty of negligence, which has partly directly caused the accident, he cannot maintain an action." This shows plainly that where the defendant can avoid the consequences of the plaintiff's negligence the latter, though it partly caused the accident, is not deemed to have done so.

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(1) (1888) 24 L. R. Ir. 369, at p. 377.

(2) I. R. 4 C. L. 150.

(3) (1883) 12 Q. B. D. 70, at p. 71.

(4) 1 A. C. 754.

(5) (1887) 12 P. D. 58, at p. 61.

To the same effect is the following case:—In *Smith* v. *Browne* (1), Gibson J. says (at p. 8):—"Assuming . . . that the plaintiff was negligent . . . I am of opinion that there was evidence to justify a jury in holding that, by reasonable care on the part of Enright, the accident could have been avoided. In that case the direct and immediate cause of the misfortune would have been Enright's negligence, and the defence of contributory negligence was rightly found against the defendant."

These cases establish that where the defendant could, by reasonable care, have avoided the consequences of the plaintiff's negligence, that negligence in point of law is not—or does not—"a cause," *Doyle* v. *Kinahan* (2); "a *causa causans*," *McDonnell* v. *G. S. & W. R.* (3), and *Coyle's Case* (4); "contribute to," *Davey* v. *L. S. W. R.* (5); "directly partly cause," *The Bernina* (6); "a proximate cause," *Smith* v. *Browne* (1).

The practical result of this is that where there is evidence to go to a jury that the defendant, by the exercise of ordinary care, could have avoided the consequences of the plaintiff's negligence, the judge may leave the questions in ordinary language, thus:—1. Was the defendant guilty of negligence? 2. Was the plaintiff guilty of negligence? 3. Could the defendant, by the exercise of ordinary care, have avoided the consequences of the plaintiff's negligence?

(1) (1891) 28 L. R. I. 1.
(2) I. R. 4 C. L. 150.
(3) (1888) 24 L. R. Ir. 369.
(4) 20 L. R. I. 409.
(5) (1883) 12 Q. B. D. 70.
(6) (1887) 12 P. D. 58.

Or if he prefers to retain the old fiction of "sole cause," he may leave the questions:—Was the injury caused (or directly caused) by the negligence: 1. Of the plaintiff alone? (2) Of the defendant alone? 3. Of both? But if he adopts this course, he should tell the jury:—If you are of opinion that the defendant, by reasonable care, could, in *the result*, have avoided the consequences of the plaintiff's negligence, in such case, in point of law, the accident was caused solely by the defendant's negligence, and you should answer the questions—1. "No." 2. "Yes." 3. "No."

The second form is really the first in a disguised shape. The answers to the questions in the first case determine the answer to the three questions in the second. It is impossible to leave the three questions in the second form to a jury in a case in which there is evidence that the defendant might have avoided the consequences of the plaintiff's negligence without in substance leaving the former question 3 to them, and telling them that on it depend their answers to 1, 2, and 3 of the second; and that the latter are not to be understood in their *ordinary* sense.

Radley v. *London and North Western Railway Company* (1) appears to me conclusive authority for this. The case was tried before Brett J. His direction to the jury will be found at p. 755. It was in substance identical with his statement of the law in *Davey* v. *London and South Western Railway Company* (2), stated above, except that it did not contain the final clause dealing with the case where the defendants could, by reasonable care, have avoided injuring the plaintiff though he was negligent. In the Exchequer, Bramwell B., in giving judgment, said (L. R. 9 Ex., p. 74):—"The plaintiffs contended ... that according to *Davies* v. *Mann* (3), assuming there was negligence on their part, yet if the defendants could have avoided doing the mischief by reasonable care, they were bound to do so, and the plaintiffs objected to the learned judge's summing up, that this had not been left to the jury. This also seems well founded. There must, therefore, be a new trial." The case then went to the Exchequer Chamber (L.R. 10 Ex. 100). At p. 102 there is the curious statement that the note of the

(1) 1 A. C. 754.
(2) 12 Q. B. D. 70.
(3) 10 M. & W. 546.

summing up of Brett J. is omitted, "as not being required for the purposes of this report." The decision of the Exchequer was reversed (Denman J. alone dissenting, on the ground that the law as laid down in *Tuff* v. *Warman* (1) was not sufficiently explained to the jury. Archibald J. thought that it had been.) The leading judgment was delivered by Blackburn J. He delivered an elaborate judgment dealing with "causa sine qua non," and "proximate cause," and says "the question comes to be, could the plaintiffs avoid the consequences of the defendants' negligence." Not the other question as in *Tuff* v. *Warman* (1). He then says: "Then comes the question whether the judge gave a sufficient direction to the jury. Now I must disclaim the idea that any learned judge is bound to follow a particular form of words; the direction should be such as to convey to the jury the real question." The report proceeds: "The learned judge then referred to the direction of Brett J., and expressed his opinion that it was sufficient." There was then the appeal to the House of Lords (2), which was decided solely on the ground of misdirection (p. 758). Lord Penzance delivered the leading judgment. He said (at p. 758): "The law is . . . perfectly well settled, and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, *in fact*, have contributed to the accident, yet if the defendant could *in the result*, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." (The italics are mine.) "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (3), supported in that of *Tuff* v. *Warman* (1), and other cases, and has been universally applied in cases of this character without question. The only point for consideration,

(1) 5 C. B. N. S. 573.
(2) 1 A. C. 754.
(3) 10 M. & W. 546.

therefore, is whether the learned judge properly presented it to the mind of the jury." He then minutely examines the terms of the summing up, and arrives at the conclusion that he did not do so, and on this ground alone a new trial was directed. Lord Blackburn concurred in reversing his own decision in the Exchequer Chamber, but his language is not very clear. He seems to agree as to the proper questions to be left to the jury, but to hold that they had been left, but not answered. Lord Gordon also concurred.

Now these two propositions stated by Lord Penzance were carefully framed; it will be observed that they are wholly free from the adjectives, remote, proximate, immediate, direct, &c., and also such phrases as sole or exclusive cause, causa causans, or sine qua non, &c. Lord Cairns brought to this case, one may say, a fresh mind untrammelled by the old statement of the law as to sole cause, &c. He says: "My Lords, I have had the advantage of considering the opinion which has just been expressed to your Lordships in this case by my noble and learned friend, and, concurring as I do *with every word of it*, I do not think it is necessary that I should do more than say that I hope your Lordships will agree to the motion which he has proposed." A unanimous decision of the House of Lords with such an exceptionally emphatic statement by Lord Cairns ought to, if anything could, settle the law and practice. The case is generally understood to have done so. (See *Delany* v. *Dublin United Tramways Co.* (1), where Palles C.B. quotes the two propositions as settled law.) I am aware of only two cases in which any doubt has been cast on it. One is the *Vera Cruz* (2), where, at pages 92, 93, and 94, Butt J. apparently holds that not only the final proposition in *Tuff* v. *Warman* (3), but also the principle as laid down in *Radley's Case* (4), are not law. I cannot find that this view of Butt J. has ever been accepted by any other judge. We must follow the clear judgments of the Exchequer Chamber in the one case, and of the House of Lords in the other.

The other case I refer to is *Butterly* v. *Mayor, &c., of Drogheda* (5). The judgment of Lord O'Brien L.C.J. in that case was strongly relied on for the defendants. There three questions were left to the jury:—(1) Were the defendants, by their workmen, guilty of negligence? (2) Was the plaintiff guilty of negligence? (3) Could the defendants, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence? The jury answered all three questions—"Yes." There was plainly no evidence of (3). The case was argued on this ground, and decided by Boyd and Wright JJ. on this ground; but neither of these judges suggested for a moment that (3) was not a proper question, if there had been evidence to support it. Wright J. says the very reverse at p. 149. In the judgment of Boyd J., I think the word "not" is inserted by mistake in the passage at p. 146, where he is made to say: "in those cases it was held that a plaintiff, in like circumstances, was not entitled to recover in case a defendant could, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence." The following sentences make this plain. However; Lord O'Brien L.C.J. calls question (3) "a formula," and says it is "calculated to perplex and embarrass a jury." He says, "I have invariably refused, in these negligence cases, to leave questions in this form to a jury." I may point out, however, that the Chief Justice apparently fails to see the importance of the question in a proper case. He states, at p. 138, "If there be two causes directly contributing to the accident, one the negligence of the defendant and the other the negligence of the plaintiff, the result is a verdict for the defendant." But he apparently entirely fails to appreciate the fact that it is the "formula" which determines which cause does directly contribute to the accident, and if the defendant could by reasonable care have avoided the consequences of the plaintiff's negligence, the law says that the plaintiff's negligence did not directly contribute to the accident. Again, at p. 141, he cites the statement of FitzGerald B. in *Doyle* v. *Kinahan* (1), "That which alone can entitle the plaintiff to recover is that the defendant's default was the *entire* cause of the injury"; and adds: "Here no one can say that the defendant's default was the entire cause." Here again he takes the words in their ordinary sense, and ignores

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(1) 30 L. R. Ir. 725, at p. 739.

(2) (1884) 9 P. D. 88.

(3) 5 C. B. N. S. 573.

(4) 1 A. C. 754.

(5) [1907] 2 I. R. 134.

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(1) I. R. 4 C. L. 150.

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the formula, entirely overlooking the careful explanation of FitzGerald B. "I do not think it can be understood that the plaintiff's negligence would, *as a cause*, have *contributed*, with the defendant's negligence, to the injury, if the defendant might, by the exercise of ordinary care on his part, have avoided the *consequence* of such neglect." The result of ignoring the formula is that he wholly mistakes the existing law. He apparently thinks it better to give a jury a dissertation on "causa sine qua non" and "causa causans" and "immediate" and "proximate" causes, p. 144, than to leave the simple question, No. 3 in this case, and he fails to recognize that the "formula" is the test of the plaintiff's negligence being "causa causans," as pointed out by Palles C.B. in *Coyle's Case* (1) and *M'Donnell's Case* (2).

The judgment bears a striking resemblance to the direction of Brett J. to the jury in *Radley's Case* (3) and to the judgment of Blackburn J. in the same case in the Exchequer Chamber. Lord O'Brien L.C.J. does not refer to *Radley's Case* (3), but the effect of his judgment is that he always declined to "perplex and embarrass the jury" with a certain formula (No. 3). It seems to me equally clear that it was because Brett J. took this course in *Radley's Case* (3), and did not leave this formula to the jury, that the House of Lords set the verdict aside for misdirection. As to the case of *Reynolds* v. *Tilling* (4), on which he relied so strongly, and on which the King's Bench declined to act in the present case, I need only say that I respectfully adopt the remarks of Wright J. in *Butterly's Case* (5), at p. 149. If the view taken of it by the Chief Justice is correct, it practically amounted to applying the first proposition of Lord Penzance without the vital qualification of the second. I have read the report of *Butterly's Case* (5) in the Court of Appeal in Mr. de Versan's book. The Court decided the case on the same ground (no evidence) as Wright J., and do not appear to have referred to the remarks of the Lord Chief Justice.

In Ireland the Common Law Procedure Act abolished the general issue, and contributory negligence had to be specially pleaded. In those days pleading was very strict, and demurrers and motions to set aside pleadings were usual. A pleading raising two contradictory issues of fact would have been set aside as a matter of course.

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(1) 20 L. R. Ir. 409.

(2) 24 L. R. Ir. 369.

(3) 1 A. C. 754.

(4) 19 T. L. R. 539.

(5) [1907] 2 I. R. 134.

In 1879, in *Rattray* v. *Cork and Macroom Railway Co.* (1), there was a motion to set aside a plea of contributory negligence. The plea was as follows:—The plaintiff, "by his own want of ordinary care, so far directly contributed to the happening of the injuries complained of, that but for the said want of ordinary care on his part the same would not have happened. The defendants could not by the exercise of ordinary care and caution on their part have avoided the consequences of the said want of care on the part of the said plaintiff." Palles C.B. said, at page 388: "The first defence . . . is one of contributory negligence. It is framed as such a defence usually has been in this country since *Scott* v. *Dublin and Wicklow Railway Co.* (2), and it has more than once undergone the test of a demurrer." Dowse B. said, at p. 390: "This form of pleading has been adopted for many years, and I would look forward with great fear to any change. The 56th section of the Common Law Procedure Act, 1853, in its terms distinctly provided that the defence should state all facts which constituted the ground of defence in ordinary language, and as concisely and clearly as possible. Out of deference to that section the profession adopted this form of pleading, which was first in its terms suggested by *Tuff* v. *Warman*" (3). FitzGerald B. concurred. The word "directly" was not discussed so far as the report shows, but it is impossible that it could have been overlooked by such a Court, or by the counsel for the plaintiff, the late Lord O'Brien L.C.J.

The case was a test case, as it was the first time the question was raised whether the old settled plea of contributory negligence could be used under the Judicature Act which had recently come into operation. It may be assumed that great care was taken to have the plea in the settled form. I can speak with some knowledge on that, as I drew the plea myself. This continued to be the settled form of plea down to the Rules of 1891. I examined the record in *Smith* v. *Browne* (1) (January, 1891), and I find it was the plea in that case. Appendix D. sect. (5), to these Rules substituted the form used in the present case, viz. "There was contributory negligence on the part of the plaintiff." The questions left to the jury on this plea have always been: (1) Did the plaintiff, by his want of care, &c., so directly contribute, &c.? (2) If so, could the defendant, by the exercise of ordinary care, have avoided the consequences of the said want of care on the part of the plaintiff? This has been done in innumerable cases. In a great number the answers have been (1), Yes; (2), Yes. Until the present case I have never heard it suggested that these answers are contradictory, or that they do not make a good verdict for the plaintiff. If they are contradictory, this plea, so solemnly approved of by Palles C.B., and FitzGerald and Dowse BB., as above, was always a direct invitation to contradictory findings.

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(1) 4 L. R. Ir. 386.

(2) 11 I. C. L. R. 377.

(3) 5 C. B. N. S. 573.

This plea and the practice under it are entirely in accordance with the law as stated in the judgment in the Privy Council in the *Grand Trunk Case* (2). If the two findings in the affirmative are contradictory, the plea is directly calculated to cause a mis-trial, and every finding as above is contradictory. The judgment in the *Grand Trunk Case* (2) is really only a more explicit and emphatic statement of what is conveyed by this plea. It adopts the words "directly contribute"—it substitutes for the words "that but for such negligence the accident would not have happened," the more explicit words "formed a material part of the cause of it." Since the above was written I came across the case of the *Canadian Pacific Railway Co.* v. *Frechette* (3), before Lords Haldane, Dunedin, and Atkinson, in the Privy Council. At p. 878 Lord Atkinson actually suggests the form of a plea, based on *Tuff* v. *Warman* (4), practically identical with that in *Rattray's Case* (5), but does *not* use the term "directly." I have no doubt that if he had had at hand his old brief in *Smith* v. *Browne* (1) he would have followed the settled form in *Rattray's Case* (5), which he would have found there, and which follows his own judgment in the *Grand Trunk Case* (1) more accurately than the form he prepared from memory in the *Canadian Pacific Case* (2).

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(1) 28 L. R. Ir. 1.
(2) [1913] A. C. 838.
(3) [1915] A. C. 871.
(4) 5 C. B. N. S. 573.
(5) 4 L. R. Ir. 386.

Of course this plea is inapplicable in cases in which there is no evidence to support the allegation that the defendant could by reasonable care have avoided the consequences of the plaintiff's negligence. Examples of one class of such cases are to be found in *Butterfield* v. *Forrester* (3), and *Butterly* v. *Mayor of Drogheda* (4), where the local authority left a heap of stones on the road, and the plaintiff could have seen it, and drove into it.

Another more important class consists of the level-crossing cases, where a train comes up at full speed to a level crossing, and it is impossible for the driver to stop so as to avoid the accident. This does not apply in the present case. Holmes J. says, in *Smith* v. *Browne* (5), at pp. 6, 7: "The observations of judges in cases where accidents have occurred on level railway crossings have no application in actions like the present. Where a person, without looking out for an approaching train, steps upon a railway-line, and is run down by a locomotive before he has cleared the rails, his negligence is almost necessarily final and conclusive. The engine-driver has neither time nor room to take any steps to prevent the catastrophe. But it is quite different with street traffic. We see every day in the busy parts of cities attempts, generally successful, made by drivers to save the heedless and unwary. . . . The negligence of a foot-passenger, however great it may be, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to prevent its consequences." Gibson J., at pp. 8, 9, speaks to the same effect.

Coyle v. *Great Northern Railway Co.* (6) was strongly relied on for the defendants. The same principle applies to that case. At p. 417 Palles C.B. says: "As the accident could not have happened unless the plaintiff were at that particular moment on that portion of the line, his negligence in being there is at least a *causa sine qua non* of his death. Whether it was a *causa causans* depends on this—was there a neglect on the part of the defendants of anything whereby the consequences of the plaintiff's negligence might have been prevented?" At p. 419 he adds: "Is there, then, evidence of such negligence on the part of the defendants as, but for it, the consequences of the plaintiff's negligence might have been obviated? To answer this question in the affirmative it must be shown, not only that the defendants were guilty of some negligence, but that that negligence was of such a character as that, if they had acted with due care, the consequences of the plaintiff's negligence could have been obviated. What is the case? . . . I hold that it has not been shown that it would have been at all possible for the engine-driver—if an engine-driver had been there—to pull up the train so as to avoid the accident. . . . I am of opinion . . . that there was no negligence of the defendants, but for which the consequences of the plaintiff's negligence might have been obviated; and that upon that ground the verdict should have been directed for them."

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(1) [1913] A. C. 838.
(2) [1915] A. C. 871.
(3) 11 East 60.
(4) [1907] 2 I. R. 134.
(5) [1891] 28 L. R. I. 1.
(6) 20 L. R. Ir. 409.

In the year 1913 we have a statement of the law free from all connexion with the objectionable fiction, frankly throwing it over, and emphatically contradicting it. It is in substance a re-statement of the principles laid down in *Radley's Case* (1).

The case is *Grand Trunk Railway* v. *McAlpine* (2). It was a case of a man being run down by a shunting engine on a siding which crossed a public street. It was not a "level-crossing case" in the ordinary sense, i.e., a case of a train on the main line going at full speed. It partly depended on a Canadian statute, but the judge had made a statement of the English law of negligence, and the relevant portion of the judgment of the Privy Council is as follows (p. 845): "This is an entirely erroneous view of the English law. Whether, in a case of this character, the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact, to be decided in each case on the facts proved in that case. There is no such rule of law in England as that if a person about to cross a line or lines of railway, looks both ways on approaching the track, he need not look again just before crossing it. Neither is it true, as the learned judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary, a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shown that the defendant could, by the exercise of ordinary care and caution on his part, have avoided the consequences of the plaintiff's negligence." This is plainly a statement of the law in which every word has been weighed and considered. "Has directly contributed to the accident" might seem plain enough, but the Lords, to put their meaning beyond any possibility of doubt, add, "that is, formed a material part of the cause of it." If it is at all a correct statement of the law, it put an end to all the fictions based on the fiction that the defendant's negligence must be either the sole cause or the sole direct cause. It puts an end to the idea that the plaintiff's negligence, being part of the cause of the accident, or directly contributing to it, disentitles him to recover. None of these things matter "provided it be shown that the defendant could, by the exercise of ordinary care and caution on his part, have avoided the consequences of the plaintiff's negligence." It puts an end to "fault of both," "both to blame," &c., &c., provided it can be shown, &c. The judgment was delivered by Lord Atkinson, but it was the joint judgment of himself and Lords Haldane, Dunedin, and Moulton (possibly of only three of the four); they made an order allowing the appeal. The judgment was held over for at least a fortnight. The case itself turned, to a great extent, on Canadian statutes. The jury had found a verdict that the accident was caused by the common fault of plaintiffs' and defendants' servants—fixed the amount of plaintiff's damage at $9,000, but took off $2,500 in consequence of plaintiff's contributory negligence. This could be done under Canadian law. I venture to apply to the judgment the remark of Lord Dunedin in *Trim Joint District School Board of Management* v. *Kelly* (1): that even though it is not a decision on the point, "yet it will be well to remember that persons who use accurate language may formulate a general rule which is quite accurate in its application to cases outside that which was at the moment under discussion." I also venture to include the noble Lord himself and his colleagues in the *Grand Trunk Case* (1) among the persons he refers to.

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(1) 1 A. C. 754.

(2) [1913] A. C. 838.

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(1) 14 A. C. 667, at p. 684.

The findings of the jury in the present case are as follows:—

1. Was the driver of the tram-car negligent — (*a*) as to rate of speed? Answer, "No." Or (*b*) as to not keeping the proper look-out? Answer, "No." Or (*c*) in not sounding the gong? Answer, "No." Or (*d*) in not slackening speed. Answer, "Yes."

2. Was the plaintiff negligent when approaching the tram-car, and, if so, was it not keeping a proper look-out? Answer, "Yes."

3. If the plaintiff was negligent, could the tramway-driver, by reasonable care, have avoided the consequences of such negligence? Answer, "Yes."

4. Was the accident directly caused—(*a*) exclusively by the plaintiff's negligence? Answer, "No." Or (*b*) exclusively by the negligence of the tram-car-driver? Answer, "No." Or (*c*) by the negligence of both concurrently? Answer, "Yes."

5. If you find for the plaintiff, assess damages. Answer, "£20."

The course taken by Kenny J., in dividing up the question of negligence in the manner he has done in questions 1 and 2 was not usual. Years ago, when I was familiar with these cases, I remember a case I was in where a judge left to the jury the question, "Were the defendants negligent; if so, how?" Palles C.B. expressed a strong view that this could not be done, saying, "You have no right to cross-examine a jury." This form of question seriously increases the possibility of a disagreement of a jury, who might have agreed on the general question of the defendant's negligence. Lord Bramwell said, in *Dunkirk Colliery Co.* v. *Lever* (2), "If juries had to give reasons for their verdict, trial by jury would not last five years." However, in the present case the course taken by Kenny J. in this respect has operated most beneficially, and has given me at all events the greatest assistance in arriving at my decision in the case. At the trial there was a request by the defendants for a direction; but otherwise there was no objection to any of the questions left to the jury, and no suggestion that any other question should have been left to them.

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(1) [1913] A. C. 838.

(2) 9 Ch. D. 20, at p. 28.

The plaintiff could have avoided the tram by either stopping to let it pass, or by altering his course so as to pass behind it. The driver of the tram-car could have avoided the plaintiff only by stopping or slackening his speed. He did neither. He could also attempt to induce the plaintiff to avoid the tram by giving him notice of his danger by shouting or sounding his gong. He did both. Now the first question left to the jury was admirably framed, so as to define, as far as possible, the nature of the driver's negligence. The jury found that the driver was not negligent as to speed, as to look-out, or as to sounding gong. That is, that he saw the plaintiff, that he took all proper steps to induce the plaintiff to keep out of his way; but they found that he was negligent in not slackening speed. The substance of this is, that he did all he could to induce the plaintiff to avoid the tram, but that he did nothing to alter the speed of the tram; he could not, of course, alter its direction. The finding as to speed and the finding as to negligence are quite consistent. A tram is approaching a place where a street crosses the street over which it is travelling. The jury found that the speed was reasonable. Let me cite the judgment of FitzGibbon L.J., in *Devlin* v. *Corporation of Belfast* (1). In that case the plaintiff was a pedestrian, injured by a collision between a trap and a tram-car. The Lord Justice says:—"Each driver was bound to drive at a reasonable speed, and, as he approached the cross-streets, to see that no person or vehicle was coming dangerously near from the other direction. Each driver was also bound to have his vehicle under such control as would enable him to pull up in time to avoid a collision with any person, vehicle, or thing which he might reasonably expect to see as the other street opened to his view. A runaway horse, a straying child, or a drunken man was as much to be avoided, if reasonably possible, as any other object, including a reckless driver." May I add, a very careless man? The jury here knew

(3) [1907] 2 I. R. 437, at p. 453.

the place well. The result of the findings in No. 1 plainly is—He was not going too fast. He saw the danger. He could, and ought to, have slackened speed to avoid the old man; but he confined his efforts to trying to get him to avoid the tram, and this was negligence. A more intelligent and discriminating finding it is difficult to conceive. There never has been any suggestion that any part of the finding should be set aside on any ground.

The finding on the second question defines the plaintiff's negligence as being "not keeping a proper look-out when approaching the tram-car."

Applying these findings to the third, it then amounts to this—The plaintiff was negligent in approaching the tram-line without keeping a proper look-out; but the defendant's driver could have avoided the consequences of this negligence (i.e., the collision) by slackening speed, and, in not doing so, he failed to exercise reasonable care.

A more specific, clear verdict for the plaintiff on the joint result of findings 1, 2, and 3 could not have been found. However, it is said that No. 4 (*c*) is wholly inconsistent with all this, and shows that the jury cannot have understood their own finding on No. 3.

I have already indicated my view that questions 1, 2, and 3 disposed of the action, and that No. 4 was unnecessary. Kenny J. apparently thought that No. 4 was the governing finding, and that he was at liberty to disregard No. 3. But No. 4 (*a*) has been ignored. No. 4 (*c*) is inconsistent with No. 3; it is equally inconsistent with 4 (*a*). If the driver could *not* by reasonable care have avoided the consequences of the plaintiff's negligence, it must result that the injury was clearly caused by the plaintiff's negligence alone, and, therefore, the answer to 4 (*a*) should have been "Yes." This shows the impossibility of giving to 4 (*c*) the effect attributed to it by the King's Bench Division, and that it only meant that the negligence of both had *in fact* contributed to the accident. There is an unreported case in this Court (*Ivory* v. *Dublin Tram Co.*), of which, however, we have had the advantage of seeing the full and accurate note taken by Mr. de Versan in the book which has so often been the foundation of judgments in this Court. In this case Mr. Justice Kenny left the same questions to the jury as in the present case. The answer to No. 4 was identical with that in the present case. The answers to Nos. 1 and 3 were not clear. The Court had to decide which side was entitled to judgment on the findings. What did they do? Did they say 1 and 3 are not clear, but we have a clear verdict for the defendant in 4, and we will act on it? So far from it, that Walker C. and Cherry L.J. never even referred to 4 as giving any assistance, and Holmes L.J. only referred to it by saying that it was "an unusual question and not necessary, and only reiterates what went before." The case was decided on a careful examination of findings 1, 2, and 3, by the light of the evidence, and no attention whatever was paid to 4. The case was decided on the ground that the jury's answer to No. 3 must be taken to be: "No"—Lord Justice Cherry saying so in express terms. There can, I think, be no doubt that that Court would have entered judgment for the plaintiff on the present clear findings on 1, 2, and 3. Holmes L.J. laid special stress on the fact that there was no negligence on the part of the tram-driver in not pulling up, as he tried to do so as soon as he saw the plaintiff.

I have already endeavoured to show that the proper legal answer to 4 depends entirely on the finding as to 3, and is a matter for direction one way or another according to that finding. However, we must construe the present findings. Lord Atkinson says in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1): "Courts of law often have to construe the answers (in writing) of juries to questions put to them by the judge." . . . "In doing this the tribunal of law does not usurp the jurisdiction of the tribunal of fact, and from facts found by the latter draw a further inference of fact. It merely discharges its proper and exclusive function of construing written documents."

In *Crawford* v. *Vance* (2), it was sought to set aside a judgment on the ground that the findings of the jury were contradictory. In the King's Bench Division, Gibson J. said: "It is impossible to say which findings are to be disregarded and which are to prevail .... I cannot harmonize them by any process of reasonable construction" (p. 568). Madden J. said: "I can find nothing in the answers to questions 3 and 4 suggesting to my mind that the jury had not a substantial understanding of the issues submitted to them" (p. 552). Lord O'Brien L.C.J. said: "We should, I think, be astute to render the findings consistent; but without having recourse in any way to astuteness, this seems to be a reasonable explanation," etc., p. 573; and at p. 575 he said: "This view would reconcile the findings . . . and we should reconcile them in any way that is fairly reasonable." In the Court of Appeal, FitzGibbon L.J. said, at p. 594: "It ought to be in any case most difficult, and under the circumstances of the present case it ought to be *impossible*, to set aside a verdict upon the ground on which the plaintiffs chiefly rely, and which has commended itself to Gibson J. alone of the judges who have considered this case—namely, that the jury did not understand their own findings, and contradicted themselves." Walker C. said, at p. 593: "I do not think we should be treating this patient and intelligent jury, as the judge describes them, with fairness, or treating the judge fairly, if we were to send the case to a new trial on account of the apparent inconsistency *brought out on the new trial* motion, where a *possible mode of reconcilement* exists." In this case the King's Bench Division have come to the conclusion that findings No. 3 and No. 4 (*c*) are "diametrically opposed." If finding No. 4 or any part of it is "diametrically opposed" to finding No. 3, it must be because No. 4 or some part of it must mean, or must be taken to mean, that the "defendants could not by reasonable care have avoided the consequences of the plaintiff's negligence." I confess I read the findings without even a suspicion of anything of the kind. It does not appear to have occurred to judge, jury, or counsel that there was anything of the kind until the case came on in the King's Bench Division. Are the two findings so plainly self-contradictory that a rational meaning cannot be reasonably put on them—and a "possible mode of reconcilement"? My answer to this is that a rational consistent meaning can be put on them by simply reading them in the ordinary sense of the language used, viz., the accident was the direct result of the negligence of both, but *in the result* the defendant by ordinary care could have avoided the result of the plaintiff's negligence. But, further, a clear consistent meaning can be put by using them in the sense in which they were used by the Lords in the Privy Council in the *Grand Trunk Case* (1), and in the plea so solemnly approved of in *Rattray's Case* (2).

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(1) 15 A. C., at p. 449.

(2) [1908] 2 I. R. 521.

To illustrate this, I have put side by side the present findings, and findings in the terms of these two cases. (A) is in the very terms of the plea in *Rattray's Case* (2). (B) in the very terms of Lord Atkinson's judgment in the Grand Trunk case. (C) The questions in the present case.

A.	B.	C.
X. Did "the plaintiff by his own want of ordinary care so directly contribute to the happening of the injuries complained of that but for such want of care on his part the same would not have happened"? Yes.	X. Did the "plaintiff's negligence directly contribute to the accident, that is, did his action form a material part of the cause of it"? Yes.	4 (c). X. "Was the accident directly caused by the negligence of both concurrently?" Yes.
Y. "Could the defendant by the exercise of ordinary care on his part have avoided the consequences of the said want of care on the part of the plaintiff"? Yes.	Y. "Could the defendant by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence?" Yes.	Y (3). "If the plaintiff was negligent, could the tram-car-driver by reasonable care have avoided the consequence of such negligence?" Yes.

It certainly does not seem "fair to an intelligent jury" to hold that they "did not understand their own findings, and contradicted themselves" (see FitzGibbon L.J. in *Crawford* v. *Vance* (3)), because they adopted the language of the questions in the sense in which the Privy Council and the Exchequer Division plainly used identical terms, when accuracy of language was eminently required. If the findings in *c* are diametrically opposed, those in *a* and *b* respectively are at least equally so. The fact is that, using the language in its ordinary sense, there is no inconsistency in any of the cases. If you put a special technical meaning on the language, you can spell out the same apparent contradiction in all three.

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(1) [1913] A. C. 838.

(2) 4 L. R. Ir. 386.

(3) [1908] 2 I. R., at p. 594.

4 (*c*) really adds nothing to 4 (*a*) and 4 (*b*); it is simply a statement of their effect, as there was no suggestion in the case of inevitable accident. It follows, therefore, that if the accident was not solely directly caused by the defendants' negligence, it must have been partly directly caused by the plaintiff's negligence. Thus 4 (*b*) is just as "diametrically opposed" to No. 3 as 4 (*c*) is.

It all comes back to the old fiction of "sole cause" and "entire cause." The great disadvantage of a legal fiction of this kind is that when you deprive a proposition of its real meaning, and substitute an artificial meaning, but continue to use the old words, the natural meaning has a strong tendency to assert itself. Now, from the cases that I have referred to it appears the Courts have held, in order to get rid of the "sole cause" theory, that where the defendant could have avoided the consequences of the plaintiff's negligence, the latter is not to be deemed part of the cause of the accident. From this, what Lord Halsbury described in *Quinn* v. *Leathem* (1) as "the Chief Baron's inflexible logic" evolved the further proposition that a finding that the plaintiff's negligence did directly partly cause the collision involved a finding that the defendant could not by reasonable care have avoided the consequences of the plaintiff's negligence. It was in this way only that I can see that the contradiction between the findings can be worked out. It plainly applies equally to *a*, *b*, and *c*.

But can it be possibly imputed to the jury that they ever went through this process? And are we to presume that they did so for the purpose of arriving at the conclusion that they did not understand their own clear findings on 1 (*a*) (*b*) (*c*) and (*d*), 2, and 3? To do so would be, in my opinion, to act in direct opposition to the principles laid down by the King's Bench Division and this Court in *Crawford* v. *Vance* (2). Even assuming that a finding *standing alone*, that the plaintiff's negligence was part of the direct cause of the accident, may imply that the defendant could not by the exercise of ordinary care have avoided the consequences, in my opinion, 1, common sense, and 2, the legal maxim,

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(1) [1901] A. C. 495 at p. 507.

(2) [1908] 2 I. R. 521.

expressum facit cessare tacitum, require us to hold that it does not imply it when the jury have expressly found that he could have done so. Can it be really suggested that the jury believed that 4 (*c*) was No. 3 over again? Did Mr. Justice Kenny realize it or even suspect it? I have no doubt on the subject. He is the last man to leave anything obscure; but the idea of his leaving to a jury in a cryptic form a question he had already left to them in plain language is too absurd for serious consideration. There is not the slightest ground for thinking that he ever said to the jury anything like this:—"Gentlemen, question No. 4 (*c*) requires explanation. It is really No. 3 over again, in a different form. If you are satisfied that you should answer No. 3 'Yes,' your duty will be to answer No. 4 (*c*) 'No.'" This would be the duty of a judge who put the same question in two forms—a plain one and an obscure one. Mr. Justice Kenny did nothing of the kind, however, because neither he nor the jury nor anyone else had the faintest idea that 4 (*c*) was No. 3 in another form until the case came on in the King's Bench Division. I therefore am clearly of opinion that there is no ground for holding that the finding on 4 (*c*) shows that the jury did not fully appreciate and understand their answers to the plain and simple language of Nos. 1, 2, and 3.

What does 4 (*c*) come to? That the injury was the result of the negligence of both. 4 (*a*) was that "it was not exclusively caused by the negligence of the plaintiff, and 1 (*d*) that the driver was guilty of negligence in not slackening speed." None of these findings are questioned, and there is no suggestion that there was not evidence to support them all. The judgment of the King's Bench Division is based on them.

I have referred to the value of Lord Cairns's opinion. I now take the judgment of another great judge who was not affected by the old fiction of sole cause. In *Wakelin* v. *London and South Western Railway Company* (1) at (p. 47) Lord Watson says:—"It appears to me that in all such cases the liability of the defendant company must rest upon these facts—in the first place, that there was some negligent act or omission on the part of the company or their servants *which materially contributed to the injury or death com-*

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(1) 12 A. C. 41.

plained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person . . . therefore the plaintiff must allege and prove, not merely that they" (the defendants) "were negligent, but that their negligence caused or *materially contributed* to the injury. I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that, in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour." He then points out that this may be proved by the plaintiff's evidence or an admission, but holds that as the first proposition had not been proved the second did not arise. Lord Blackburn said :—"I have had the advantage of perusing in print the opinion just delivered . . . In it I perfectly agree." This was in 1886. How the "sole cause" can be insisted on after this, or how it can be said that the fact that the defendant's negligence only formed part of the cause amounted to a verdict for the defendant, I find it difficult to see.

Here the first proposition was proved and found by the jury and not questioned. The only other question would be, was contributory negligence proved and found by the jury. As the first proposition was not established, it became unnecessary to discuss the question of contributory negligence in *Wakelin's Case* (1).

Nearly thirty years later, in *Canadian Pacific Railway Company* v. *Fréchette* (2), the law is laid down in practically identical terms by Lord Atkinson, delivering the judgment of the Privy Council (Lords Haldane, Dunedin, and Atkinson) thus:—"A plaintiff suing for damages in respect of an injury sustained by him, cannot recover if his own negligence be the sole effective cause of that injury." . . . "That term (contributory negligence) can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury *as to be a cause materially contributory* to it. If the negligence of either party falls short of this, it is an

(1) 12 A. C. 41.

(2) [1915] A. C. 871.

irrelevant matter, an incuria no doubt, but, to use Lord Cairns's words, not an incuria dans locum injuriae."

In that case the jury found that the accident was not due solely to the negligence of the plaintiff. The Privy Council held that there was no evidence on which reasonable men could have so found, and on this ground gave judgment for the defendants.

Here that finding, 4 (*a*), is not questioned. Findings 1 (*d*) and 4 (*c*) are not only unquestioned, but the latter, made the ground of the judgment for the defendants, establishes—1, that the defendants' negligence, in the words of Lord Watson, "materially contributed to the injury," that it "caused or materially contributed to the injury"; 2, that in the words of Lord Atkinson, "both parties, plaintiff and defendant, were each guilty of negligence so connected with the injury as to be a cause materially contributing to it." That being so, it left undisposed of the only remaining question, the question of contributory negligence. Everything was found except the vital question on which the liability of the defendant depended, i.e. could the defendant by the exercise of reasonable care have avoided the consequences of the plaintiff's negligence?

Where there was evidence of negligence by the defendants, *dans locum injuriae*, I have found no case where the Court took the matter out of the hands of the jury, except cases where they held that the injury resulted solely from the plaintiff's negligence: e.g. the *Canadian Pacific Case* (1), *Coyle's Case* (2), &c.

Since *Tuff* v. *Warman* (3) I have found no case decided on the ground that the injury was the result of the negligence of both plaintiff and defendant. It is true that in *Wakelin's Case* (4), Lord Halsbury said at p. 45: "She may indeed establish that the event has occurred through the joint negligence of both; but if that is the state of the evidence, the plaintiff fails, because *in pari delicto potior est conditio defendentis*." But this was a case in which there was no evidence of negligence contributing to the injury by *the defendant*, and none that he could have avoided the consequences of the plaintiff's negligence. No case in which there

(1) [1915] A. C. 871.
(2) 20 L. R. Ir. 409.
(3) 2 C. B. N. S. 760; 5 C. B. N. S. 573.
(4) 12 A. C. 41.

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was such evidence has ever been held to be *par delictum*, as far as I have been able to ascertain. If taken without reference to the facts of the case, this statement might seem the direct reverse of the careful judgment of Lord Watson in the same case quoted above, and concurred in by Lord Blackburn.

In *The Bernina* (No. 2) (1) Lord Lindley (at p. 89) makes the following analysis :—3. " A is injured by B by the fault more or less of both combined." This seems to me to be practically the same thing as finding 4 (*c*) in the present case. So far from saying that this discharges the defendant from liability, he proceeds :—" Then the following further distinctions have to be made : (*a*) if, notwithstanding B's negligence, A with reasonable care could have avoided the injury, he cannot sue B ; (*b*) if, notwithstanding A's negligence, B with reasonable care could have avoided injuring A, A can sue B ; (*c*) if there has been *as much* want of reasonable care on A's part as on B's, or, *in other words*, if the *proximate* cause of the injury is want of reasonable care on both sides, A cannot sue B. In such a case A cannot with truth say that he has been injured by B's negligence ; he can only with truth say that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law." To make the whole passage consistent (*c*) must be taken to apply only to cases not covered by (*a*) and (*b*). If the last sentence in (*c*) is read alone, it would really mean the same thing as " by the fault more or less of both combined," the opening words, and there would be no room for the distinctions (*a*), (*b*), and (*c*). Lord Lindley indicates no dissent from Lord Esher's No. (5) at p. 61 ; (*c*) can only be reconciled with it by understanding proximate cause in (*c*) to have the same meaning as in (5), i.e. that where the defendant could have avoided the consequences of the plaintiff's negligence then the latter is not deemed to be part of the proximate cause. Otherwise the old theory of " sole cause," " entire cause," and " contribute to any extent " would remain in full force. That the above is the true explanation is, I think, demonstrated by his application of the law to the case of the mate at p. 85.

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(1) 12 P. D. 58.

The injury was admitted to be the result of the combined negligence of both. He says, "There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendant could, by taking reasonable care, have avoided the collision."

In the present case there is no finding that there was as "much want of care" on the plaintiff's side as on the driver's. It was a case of no look-out on the plaintiff's part and ignorance of the risk of collision; adequate look-out on the driver's part, and knowledge of the risk and persistence in the conduct which caused the injury. It is not a case of "par delictum."

In *Devlin's Case* (1) FitzGibbon L.J. quotes with approval Sir F. Pollock's statement:—"Where the negligent acts are simultaneous, as in the case of two persons colliding at a street corner, the rule is that if the plaintiff could, by the exercise of ordinary care, have avoided the accident, he cannot recover; but where they are successive, he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible. And the ground of both rules is the same—that the law looks upon the proximate cause; or, in other words, will not measure out responsibilities in halves or other fractions, but holds that person liable who was in the main the cause of the injury." He only read this (which did not apply to the case before him) as introductory to another which did. Sir F. Pollock's statement must be read in connexion with his further statement (Pollock on Torts, 4th ed., p. 431):—"If the defendant could have *finally* avoided the mischief by ordinary diligence, it matters not how careless the plaintiff may have been *at the last* or any preceding stage, and the plaintiff's negligence, if it is to disable him, has to be somehow more proximate than the defendant's." This appears to me practically to amount to saying that the plaintiff's negligence must be such as to make it impossible for the defendant to avoid the accident by ordinary care. I am quite sure that this would be the view of FitzGibbon L.J., as it was in this case that he described the duty to avoid drunken men, &c., already quoted.

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(1) [1907] 2 I. R., at p. 452.

As to the "last opportunity" of avoiding the accident, I think that where one man is aware of the impending danger and the other is not, public safety requires that it must be the duty of the former then to take reasonable care to avoid it; and that if he fails to do so, and the injury occurs in consequence of this, the other party's negligent ignorance of the impending danger ought not to relieve him from liability. At all events, this should be the rule applicable to street traffic as between the driver of a vehicle and a pedestrian.

The result of any other view would be disastrous. Can it be said that if a drunken man falls down in front of a tram-car the car must stop, but that if he continues to stagger up to the place where it must strike him, the driver is under no obligation to avoid the accident by stopping?

It is suggested in the judgment, as I understand it, that the *continuing negligence of the driver up to the time of the collision*, coupled with the *continuing negligence* of the plaintiff, though the latter did not see the risk, and the former did, and could, with reasonable care, have avoided it, is not sufficient to make the defendants liable. The words of the Lord Chief Baron are:—"I do not see—those two negligent acts being concurrent, and the direct cause of the accident—where there is room for any intervening cause." The only case in which I can find any suggestion of this kind is *Scott* v. *Dublin and Wicklow Railway Company* (1). There the plaintiff's negligence was in jumping out of a train which had overshot the platform. Pigot C.B. told the jury that, "though the plaintiff contributed to the misfortune by her want of ordinary care and caution, that would not disentitle her (the plaintiff) to recover . . . if the defendants might, by ordinary care on their part, have avoided . . . the consequence of the neglect or carelessness of the plaintiff." An exception was taken to this on the ground that, *if she left the carriage negligently*, and this negligence *contributed* to the accident, the defendants were not liable "unless the defendants could, by the exercise of care, have then, by *a new physical act*, *irrespective of said continuing negligence*, . . . have prevented the consequences of such want of care."

(1) 11 I. C. L. R. 377.

Now, it is impossible to conceive a more complete case of the injury being directly partly caused by the plaintiff's negligence, or being "the direct result of the negligence of both parties." The Court overruled the exception, FitzGerald B. saying, at p. 401, "As to the law contained in that proposition, there is not, and cannot be, any complaint on the part of the defendants; for it is only putting more strongly the necessity that the default which is relied on as the foundation of the action must be the proximate cause of the injury." The Court so held, as stated in the headnote; and also, that where there was antecedent negligence on the part of the defendants, *operating up to the time of the accident*, and then contributing negligence of the plaintiff, without which the accident would not have happened, the judge was not bound to tell the jury that the defendants were not liable unless they could, by a new physical act, *irrespective of such continuing negligence*, have avoided the consequences of the plaintiff's negligence. As to the last proposition, FitzGerald B. says (at p. 402), "There is no authority that I know of for such a statement of the law, and none was cited."

I have quoted this as dealing both with "direct result" and the "absence of intervening cause." In *Smith* v. *Browne* (1) and *Tuff* v. *Warman* (2), indeed in practically all the collision cases, the plaintiff's negligence continued up to the time of the collision. In *Coyle's Case* (3), it is true, Palles C.B. says:—"Although he may not have seen it [the train approaching the level crossing], he is equally in the position, so far as negligence is concerned, as if had seen it, because it was his duty to have looked." But he does not hold that this relieved the defendants, as he immediately proceeds:—"Is there, then, evidence of such negligence on the part of the defendants as, but for it, the consequences of the plaintiff's negligence might have been obviated?" He held that there was not, as the train could not have been stopped. Here the jury found that the tram could and ought to have been pulled up.

However, I think I have a clear guide in the present case in the law laid down by the King's Bench Division twenty-five years ago, and never questioned as far as I know. In *Smith* v. *Browne* (1)

(1) 28 L. R. Ir. 1.

(2) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(3) 20 L. R. Ir. 409.

Appeal.
1916.
GAFFNEY
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the new trial motion was argued for the defendants by the present Lord Atkinson (then Solicitor-General) and the late Mr. Justice Wright; for the plaintiff by Sir Edward Carson and the late Judge Adams. For my purpose, it is enough to state that Smith, almost deaf, was walking across a street in Tralee in a diagonal direction at a place where there was no crossing. Browne's driver, Enright, turned his horse, and proceeded to drive up the street. He saw the plaintiff for the first time a short distance off, and shouted a warning. Smith, not hearing, continued on his course, whereupon the driver began to pull up, and shouted again, but immediately after collided with Smith, who was seriously injured. Their courses were crossing at an acute angle. Here it was a right angle. The important thing is that the collision occurred from their both proceeding to the same point, and that both were moving towards *it up to the moment of* the collision.

The argument for the defendants was thus put:—" A driver is fairly entitled to expect a passenger to heed his warning and stop; and it is not until he sees that his warning is unheeded that he should pull up." This view was strongly pressed in the present case by the Attorney-General. Indeed, as I understood him, he went further and contended that there was no duty to pull up until the plaintiff was actually on the tram-line, though it might then be too late. The Lord Chancellor remarked that this argument seemed to rest on the assumption that there was an absolute duty on the part of the foot-passenger to avoid the tram-car. I ventured to add that it was putting the case on the same footing as a collision between a steamer and a sailing-vessel, where the duty of the former is to keep out of the way of the latter, and the duty of the latter to keep her course and speed. (See Regulations, Nos. 20 and 21, set out in [1896] P., at p. 318.) Holmes J. said, in his judgment in *Smith* v. *Browne* (1):—" Assuming, however, negligence on the part of the plaintiff, the question still remains whether Enright took reasonable care to prevent its consequences... The negligence of a foot-passenger, however great it may be, does not excuse the owner of a vehicle from exercising a reasonable amount of care and skill to prevent its consequences. This is,

(1) 28 L. R. Ir. 1.

indeed, admitted by counsel for the defendant; but they argue that Enright fulfilled this obligation by giving a warning shout. The Solicitor-General contends that a driver is entitled to assume that his warning will be attended to, and that it is only when he sees that it has not been heard that he is bound to pull up. No doubt, this may be so when there is time for the successive processes. But what is to happen if the driver only first observes the danger when there is barely time to stop his horse? Is he to go on trusting to the chance that his voice will be heard, and that the heedless man will have sufficient presence of mind to take the precise course by which the danger can be avoided? In the present case it is admitted that Enright saw the plaintiff's risk when he was somewhere between three to seven yards distant from him. The jury might reasonably infer that he could have then pulled up, and Smith would have been safe. The defendant seems to me to be upon the horns of a dilemma. He either had time after he noticed that his warning was not heard to stop his horse, in which case he ought to have done so, or, when he saw the plaintiff, there was no time for the two-fold process, in which case he ought not to have trusted to the shout alone. I am of opinion not only that there was evidence of negligence to go to the jury—a proposition not disputed—but also that the finding was eminently reasonable." He adds: "Even if I doubted the propriety of the verdict, I would hesitate to set it aside. My experience, coinciding in this respect with that of other judges, is, that Dublin jurors, both special and common, deal with actions of this kind in a very cautious spirit. They are thoroughly aware of the principle that they must be satisfied of a distinct and definite act of negligence on the part of the driver before his master can be made responsible; and they are not disposed to view too critically the conduct of a man who falls into a mere error of judgment when placed in trying circumstances." This case was tried by a Dublin special jury. Gibson J. said:—" Each (the driver and the pedestrian) is bound, so far as possible, to keep clear of the other. . . . Had he driven to the left of the street, his proper side, or had he pulled up in time—and there was evidence he could have done so—the accident would not have happened. Whether Enright, by reasonable care, could have avoided the collision was certainly a jury question."

Smith v. *Browne* (1) has never been questioned. It is several times cited as an authority in Lord Halsbury's Laws of England, and in vol. xxi, p. 416, as the foundation of the following statement in Art. 703:—"But the duty of the driver of a vehicle is not satisfied by creating a warning noise, and in an emergency, where either the vehicle or the foot-passenger must alter his course to avoid collision, the driver of the vehicle does not escape liability if he cannot show that he has tried to pull up or to one side." Article 701 on the preceding page states (what was not disputed) that tramway-drivers are subject to the same liability for driving recklessly as the drivers of other vehicles. This case appears to me to be a conclusive authority, and an admirable exposition of the application of the law to the facts of the present case, and it shows, in my opinion, that on the conflicting evidence in the present case it could not have been withdrawn from the jury.

The King's Bench Division did not suggest that No. 1 (*d*) or No. 4 (*a*) should be set aside on any ground. The defendants' notice of motion was confined to No. 3, and impeached it only on the ground that there was no evidence to support it, or that it was against the weight of evidence. We start, therefore, with unimpeached findings—1. that the defendants were guilty of negligence contributory to the accident continuing up to the happening of the accident. 2. That the accident was not exclusively caused by the plaintiff's negligence. The latter of these is plainly inconsistent with a finding that the defendants could not by reasonable care have avoided the consequence of the plaintiff's negligence, for in that case the accident would have been plainly caused by the plaintiff's negligence alone. The King's Bench Division cannot have held that there was no evidence to go to the jury on No. 3, for they held that there were findings on it diametrically opposed, and that they had to choose between them, and gave leave to serve notice to set one aside; and they acted on the other. This is wholly inconsistent with the view that the question should not have been left to the jury at all. The judgment really never refers to the evidence at all. I am satisfied they did not intend to set No. 3 aside on the ground that it was against the weight of evidence. That would only have resulted in a new trial. (The Lord Chief Baron's views on sect. 48 of the Judicature Act are well known.) If the Court thought there was no evidence to go to the jury on No. 3, when left directly to them in No 3, they must have held the same thing when it was impliedly left in No. 4, and they should have disregarded both findings. This they plainly did not do. If they held that the continuing negligence of the defendants, and the absence of an intervening cause, made the question an improper one to be submitted to the jury in this case, I could understand it, though I should not agree with it, for the reasons already given. But they have not said this. In such a case they should again have disregarded both answers. If the question was one for the jury, and was really answered first "Yes" and then "No," as they have in fact held, I do not see how they could do otherwise than treat it as *not* answered, as Lord Blackburn did in the House of Lords in *Radley's Case* (1), and direct a new trial. In fact, they adopted the answer "No," and rejected the answer "Yes." This was really deciding the question of fact themselves, where it had not been decided by the jury. I cannot see what jurisdiction there was to do this if it was a jury question.

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(1) 28 L. R. Ir. 1.

It is suggested that the answer to No. 3 was "metaphysical." As the answer was simply "Yes," this must refer to the question. I confess it seems to me that it is much more metaphysical to read question 4 (*c*) as meaning and involving No. 3 over again, than to read No. 3 in its plain, obvious meaning; and if it were a matter of choice, I would prefer the answer to the question itself in plain English, to the implied answer evolved from 4 (*c*).

Having regard to the judgments of this Court in *Ivory's Case* (2), if we ordered a new trial in this case, I think it would follow that the case should be tried on questions 1, 2, and 3; and that 4 should not be put to the jury. We should not order a new trial if we thought on the whole that the jury understood and intended their finding on question 3 in the ordinary sense of the words. It is a strange thing to enter judgment for a plaintiff where both

(1) 1 A. C. 754.

(2) Unreported.

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the judge who tried the case and the Divisional Court concur in thinking that it should be for the defendants. Still if there is on the face of it a good verdict for the plaintiff, and there is no sufficient ground for setting it aside, I do not think we should send the case for a new trial. If the verdict was self-contradictory, I think we should do so.

I think the verdict is a good verdict for plaintiff, and that there is no ground for setting it aside.

May I conclude by quoting and respectfully adopting the conclusion of a judgment (in a similar case) of Lord Justice Holmes?—"In coming to this conclusion, it is possible that I have been unconsciously influenced by a not unnatural reluctance to send a small case to a third [here a second] trial; but I have tried to place myself in the position of the jurors; and, knowing what I would have meant if I had given their answer to the third question, I assume that their meaning was the same": *Devlin* v. *Belfast Corporation* (1).

MOLONY L.J.:—

In this case the jury have found that the driver of the tram-car was negligent in not slackening speed, and that the plaintiff was negligent in not keeping a proper look-out; and neither of these findings has been challenged.

The jury further found, in answer to the third question, that although the plaintiff was negligent in not keeping a proper look-out, the tram-driver could, by reasonable care, have avoided the consequences of such negligence; and this finding has been set aside by the King's Bench Division, on the ground that there was no evidence in support of it proper to be submitted to the jury, and that it was against the weight of evidence.

It appears from the evidence that the occurrence took place shortly after 9 o'clock on a fine bright night in January. The plaintiff was crossing O'Connell Street, close to the Parnell Monument, and the tram-car was coming from Nelson's Pillar.

The tram-driver saw the plaintiff, and shouted to him several times, but, the plaintiff being deaf, did not hear the sounds. It is sworn to by several witnesses—and indeed not denied by the tram-driver himself—that he did not slacken his speed, nor did he pull up the car until after the plaintiff had been struck.

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(1) [1907] 2. I. R. 437.

The jury apparently were of opinion that the accident would not have occurred if the tram-driver had slackened speed or pulled up the car at the time when he perceived that the plaintiff was paying no heed to his shouts, and I think that this was a reasonable and proper finding, and amply sustained by the evidence of the several witnesses examined for the plaintiff. I therefore think that the order of the King's Bench Division setting aside the answer to the third question cannot be sustained.

The next point to be considered is, whether there is any inconsistency between the answers to the third and fourth questions? If they are inconsistent, the only course which could be adopted in the present case would be to grant a new trial; but it is the duty of the Court to reconcile the findings, if at all possible. I have carefully considered all the cases referred to in the argument, and which have been so fully discussed by the Lord Chancellor and Lord Justice Ronan, and I agree with them in their conclusion that the findings in this case are consistent, and that they amount to a verdict for the plaintiff.

Solicitor for the plaintiff: *J. F. Lidwell.*

Solicitors for the defendants: *Casey, Clay, & Collins.*

R. ST. J. C.

Appeal.
1915.
Oct. 29,
Nov. 1.

IN RE URSULA RADCLIFFE (1).

Bankruptcy—Act of Bankruptcy—Departing out of Ireland with Intent to defeat or delay Creditors—Proof of Intent—Being a Trader has departed from Dwelling-house, or begun to keep House—Debtor having ceased to be a Trader at time of alleged Acts—Bankruptcy (Ireland) Amendment Act, 1872 (35 *&* 36 *Vict. c.* 58), *s.* 21, *sub-s.* 3*—Necessity of strict Proof of Requisites for Adjudication.*

Where the act of bankruptcy relied on to obtain an adjudication is that the debtor has departed out of Ireland with intent to defeat or delay his creditors, it is necessary to establish such actual intent. The Court is not bound to presume such intent merely from the fact that creditors are thereby defeated or delayed.

Where the act of bankruptcy relied on is that the debtor, being a trader, has departed from his dwelling-house, or otherwise absented himself, or begun to keep house, it must be shown that the debtor was a trader at the time of the alleged acts.

Ex parte M'George, In re Stephens, 20 Ch. D. 697, followed.

Necessity, before granting an adjudication of bankruptcy, of having proper legal evidence of the matters necessary to be proved, stated.

APPEAL from an order of the Belfast Local Bankruptcy Court.

By an order of the Belfast Local Bankruptcy Court, made on the 18th August, 1915, Ursula Radcliffe, described as of 5 Bridge Street in the county of the city of Belfast, spinster, tobacconist, was adjudicated a bankrupt on the petition of the Imperial Tobacco Company (of Great Britain and Ireland), Limited, having their registered office at Bristol, in England, in respect of a debt of £46 8*s.* 2*d.*

The petition was in the form given in the schedule to the Local Bankruptcy Court Rules. It stated generally that Ursula Radcliffe had committed an act of bankruptcy within six months before the presentation of the petition.

As proof of the petitioning creditors' debt, an affidavit was filed by Arnold John Picken, of Belfast, a bookkeeper in the employment of the petitioning creditors, which stated that the said Ursula Radcliffe was indebted to the Imperial Tobacco Company in the sum of £46 8*s.* 2*d.*, balance due for goods sold and delivered, the particulars of which were set out in a schedule to the affidavit, for which no manner of satisfaction or security had been, to the knowledge or belief of the deponent, had or received, save as set out in the schedule; that the deponent was duly authorized by the said company to make the affidavit, and that it was within his own knowledge that the aforesaid debt was incurred, and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remained unpaid and unsatisfied. From the schedule to the affidavit it appeared that this sum of £46 8*s.* 2*d.* was made up of balances due to six different branches of the Imperial Tobacco Company.

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(1) Before O'BRIEN L.C., and RONAN and MOLONY L.JJ.

As proof of the act of bankruptcy an affidavit was filed, sworn on the 18th August, 1915, by John P. Birch, the manager in Belfast of one of the branches of the Company, which set out as follows:—

"1. On or about the 23rd day of July last the above-named Ursula Radcliffe, who is a spinster, auctioned out all her stock-in-trade, at 5 Bridge Street, Belfast, aforesaid, and on the 26th July last she wrote a letter to my firm intimating this fact, and further that she was leaving Ireland in a few days' time. 2. The said Ursula Radcliffe was at that time residing in the International Hotel, College Square, East, Belfast, and on or about the 29th day of July, I am informed and believe that she departed from the said hotel, and stated that she was leaving Ireland and going to London. 3. The shop at number 5 Bridge Street at which the said Ursula Radcliffe carried on trade has been closed since the 23rd day of July, and she has committed an act of bankruptcy, as I am informed and believe, by reason of her having closed her business premises, and having left Ireland with the intention of defeating or delaying her creditors. 4. On the 30th July, 1915, the above-named petitioners caused a debtor's summons to be issued forth of this Honourable Court, but service was unable to be effected on her, owing to the fact that she had departed from Ireland. 5. The above facts are within my own personal knowledge save where otherwise appears."

Appeal.
1915.

In re
RADCLIFFE.

On the 19th August, 1915, an order was made by the Belfast Local Bankruptcy Court directing that service of the duplicate order of adjudication should be effected by delivering it to Messrs. Wheeler & McCutcheon, solicitors for the bankrupt, and by posting by registered letter addressed to the bankrupt at 5 Bridge Street, Belfast, sealed copies of the said duplicate order, together with sealed copies of the order for substitution of service. This order was grounded on the sworn evidence of William James Gray, who stated that he had attended at 5 Bridge Street on the 18th August for the purpose of executing the warrant. "The bankrupt had left these premises, and the premises were in the possession of John Stewart, a barber. I saw his manager and he knew nothing about the bankrupt. I then went to International Hotel. She had resided there up till 26th July. She left on that day and the hotel people knew nothing of her whereabouts."

On the 11th September, 1915, Messrs. Wheeler & M'Cutcheon served notice of an application on behalf of Ursula Radcliffe to the Belfast Local Bankruptcy Court to set aside the order of the 19th August directing substitution of service, grounded on an affidavit of Ursula Radcliffe, sworn on the 9th September, and on an affidavit of Walter L. Wheeler, a member of the firm of Messrs. Wheeler & M'Cutcheon, sworn on the 10th September. A notice was also served on the 11th September that Ursula Radcliffe intended to show cause against the validity of the adjudication, and that it was intended to dispute the trading, the act of bankruptcy, and the jurisdiction of the Court; and that the said Ursula Radcliffe further alleged that the petition for adjudication did not contain the averments necessary to found jurisdiction and support an adjudication; and alternatively that it was intended to apply to the Court to review and rescind the order of adjudication, and to annul the adjudication.

In the affidavit of Ursula Radcliffe above referred to, she described herself as of 16, Priory Terrace, Cheltenham. The material matters set out in the affidavit were as follows:—

The deponent had acquired the premises at 5 Bridge Street in July, 1913, at a sum of £300. The profits were not what they were represented to be. She practised the most rigid economy in her personal expenditure, living at the International Temperance

Hotel, Belfast, at the terms of £1 a week. She had no assistant, and for the two years during which she carried on the business, with the exception of about three weeks for holidays, she attended the shop every week-day. The wholesale tobacco people had fixed a price under which the retailer might not sell, and which gave the retailer only a very small profit. She stated: "In the month of November, 1914, my health having broken down . . . my doctor advised me that I must go away for a change, and I accordingly, with great reluctance, engaged an assistant, and went on a visit to some friends in England for a period of about nine days. While there I received an offer of the situation which I am now in, and which, as it would not require to be taken up till the 1st of August, and it offered me a comfortable home and a reasonable salary, with reasonable working hours, I accepted." On her return to Belfast she tried to find a purchaser for the premises as a going concern, but not having succeeded in this she, on the 1st May, 1915, gave notice to the landlord of her intention to quit the premises on the 1st August, 1915, and advertised the business for sale as a going concern frequently in the "Belfast Evening Telegraph." Being unable to effect such sale, she posted in the shop a large placard announcing a clearance sale, and this was carried on for about three weeks, down to the 23rd July, when the fixtures and stock-in-trade were sold by auction. The sale by auction was duly advertised in the Belfast newspapers, and posters issued and stuck on the premises. The net result of the sale was £74 15*s.* 3*d.* Mr. Wheeler, of the firm of Messrs. Wheeler & M'Cutcheon, then made out a statement of her assets and liabilities, by which it appeared that her assets would pay only 6*s.* 8*d.* in the pound to her creditors. On the 26th July, 1915, she wrote a letter from the International Hotel to her unpaid creditors, including the Imperial Tobacco Company, stating as follows:—"I regret to state that my business stock and fixtures, which I caused to be sold last week, as I am retiring from business, did not realize as I had hoped. I find I have only enough to pay 6*s.* 8*d.* in the pound on the amount of my debts, after discount allowed. On hearing from you that you will accept same in full, I will send you cheque. Please reply by return, as I leave Ireland in a few days." She left with Messrs. Wheeler & M'Cutcheon, for distribution among her creditors, the entire proceeds of the realization and auction sales, excepting only £5 2*s.* 10*d.*, which she retained for her travelling to England to take up her situation, and for her subsistence until her first salary became due. On the 29th July, she handed the key of the premises in Bridge Street to the landlord's agent. On the 27th and 28th July, travellers from some of the petitioning creditors' firms called on her at the International Hotel. She informed the first of these callers what she had written to their firms, and that she was awaiting a reply; and as others continued to call, she refused to see them, as she had not heard from their firms, and could do nothing more than she had offered. She did not write to Messrs. Wheeler & M'Cutcheon since leaving Belfast, as she thought they had probably distributed the 6*s.* 8*d.* amongst the creditors out of the money she had left them for the purpose; and to ascertain if this was so she wrote to them on the 4th September, in reply to which she learned for the first time that she had been adjudicated a bankrupt. The affidavit further set out :—" I say that I had not at the date of adjudication, nor have I since the 29th day of July last, any residence or place of business within the jurisdiction of this Court, or elsewhere in Ireland. I am and have been since the 1st day of August last engaged as assistant with Mrs. Reaford of 16, Priory Terrace, Cheltenham, and I reside at 16, Priory Terrace, Cheltenham. When I realized my stock-in-trade I did so with the intention of permanently retiring from business, and when I left Ireland I did so without any intention of returning, and for the purpose of taking up said situation, and making my permanent residence in England. I had no intent to defeat or delay my creditors, but, on the contrary, have endeavoured to act in their best interests. . . I am advised and believe that I did not commit an act of bankruptcy, and that at the date of adjudication I was not a trader, and had not a residence or place of business within the jurisdiction of the Court.

Mr. Wheeler, in his affidavit, corroborated the statements in Miss Radcliffe's affidavit, so far as they related to matters within his own knowledge. He stated that as his firm had not her address at the time of the service upon them of the bankruptcy proceedings they were unable to bring same to her knowledge or take her instructions thereon till the 6th September, when they received a letter from her present address.

The applications to set aside the order to substitute service, and to show cause against or rescind the adjudication, were heard before the Recorder of Belfast on the 20th September, 1915.

On the hearing, John P. Birch, the Belfast manager of one of the branches of the petitioning creditors' firm, was examined. He stated that after getting the letter dated the 26th July, offering 6*s.* 8*d.* in the pound, he called at the International Hotel, and tried to see Miss Radcliffe, and was told she was not in. He called several times, and on no occasion saw her. He left word with the boots that he would call at a certain time, and she did not turn up. A Mr. William Saunders was examined, and deposed to having called twice at the International Hotel and failed to see Miss Radcliffe.

The Court made an order as follows:—"It is ordered that the application to set aside the said order as to substitution of service be and the same is hereby refused. And it is ordered that the application to show cause against the adjudication of bankruptcy in this matter, or alternatively for an order rescinding the said order of adjudication of bankruptcy, be and the same is hereby refused."

From this order the present appeal was taken. For the purpose of the appeal a further affidavit had been made by Ursula Radcliffe, in which she stated that she was never informed of Mr. Birch having called to see her, or of him or anyone else having made an appointment with the boots to see her. An affidavit was also made by the manageress of the International Hotel, stating that Miss Radcliffe had remained in the hotel till the night of the 29th July, 1915; that, with the exception of a gentleman who called to see her the morning after she went away, no one that deponent saw called to see Miss Radcliffe after this; that Miss Radcliffe informed deponent, early in the week of her going away, that she was expecting letters, but none came for her that week or after she left, save one or two addressed in a female hand, and bearing an English postmark, which arrived rather more than a week after she had left, and were sent on to her in England.

Henry K.C., and *Tobias*, for the appellant:—

The petition contains merely a general averment that an act of bankruptcy has been committed. This is not sufficient. The nature of the act of bankruptcy relied on should be properly set out: *Ex parte Coates, In re Skelton* (1).

The act of bankruptcy alleged in the affidavit of Birch is having left Ireland with the intention of defeating or delaying her creditors. But the evidence shows clearly that this was not her intention. She left for the purpose of taking up a situation in England. Every publicity was given by her to the fact that she intended giving up business. She advertised the clearance sale and the auction in the newspapers and by posters in the shop. That she did not intend to defeat or delay her creditors is also shown by the fact that she left all her available assets with her solicitors for distribution among her creditors. A trader has a right to go to another country to look after his concerns, and though his creditors are thereby delayed, it is not an act of bankruptcy: *Warner* v. *Barber* (2). More especially is this so where he leaves a representative behind: *In re Woolstenholme, Ex parte Foster & Co.* (3).

Bankruptcy is in the nature of a criminal offence, and proper legal evidence should be given of the matters necessary to found an adjudication. In the present case the evidence was based merely on information and belief.

M'Gonigal K.C., and *J. H. Robb*, for the respondent:—

Under the Irish Bankruptcy Acts it is not necessary to state in the petition the specific act of bankruptcy relied on. The petition here follows the form prescribed by the rules.

We rely on three acts of bankruptcy. First, departing out of Ireland with intent to defeat or delay creditors. A person must be presumed to intend the natural consequences of his acts, and if the effect of departing from Ireland is to defeat or delay creditors the Court must presume that the intention was to do so: *Holroyd* v. *Whitehead* (4); *Richardson* v. *Pratt* (5). Here the

(1) 5 Ch. D. 979.
(2) Holt, 175.
(3) 4 Mor. 258.
(4) 3 Camp. 530.
(5) 52 L. T. 614.

effect of the debtor leaving Ireland was to deprive the creditors of their remedy of issuing writs, as she left no address, and to deprive them of the remedy by debtor's summons. An adjudication could not have been obtained against her in England, since the petitioning creditors' debt was under £50. When she left Ireland she did not give her address in England, even to her solicitors. She had no right to attach to her offer of 6*s.* 8*d.* in the pound a condition that the creditors should accept the amount in full. In *In re Woolstenholme* (1) the debtor left a representative behind, and the creditors could have found out the address of the debtor. Here the creditors knew nothing of Messrs. Wheeler & M'Cutcheon, or of the money having been left with them. Miss Radcliffe admits herself that she refused to see the representatives of the creditors.

As to the evidence on which the adjudication was granted being merely on information and belief, that objection was not taken in the Court below on the hearing of the application to rescind the orders, and should not be allowed now. The further evidence given on the hearing of that application must be taken into account.

We rely on two additional acts of bankruptcy appearing from such evidence to have been committed by the bankrupt, namely, that, being a trader, she had (*a*) departed from her dwelling-house, or otherwise absented herself; and (*b*) begun to keep house. If a trader absents himself from any place in order to prevent his creditors from bothering him, this is an act of bankruptcy: *Curteis* v. *Willes* (2). [The Lord Chancellor: — Where the application is not to show cause against the adjudication under sect. 129 of the Act of 1857, but to the inherent power of the Court to annul the adjudication as having been made without jurisdiction, can you rely on subsequent evidence, or other acts of bankruptcy?] Yes. Otherwise the extraordinary result would follow that a bankrupt, by allowing the time for showing cause under sect. 129 to lapse and then applying to annul the adjudication, would be in a better position than if he had shown cause within the time prescribed. The hearing before the Recorder

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(1) 4 Mor. 258.

(2) 1 C. & P. 211.

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was in the nature of a re-hearing. The order of adjudication was made by the local registrar under the jurisdiction given to him by Rule 5 of the Local Bankruptcy Rules, which order, by Rule 8, the Recorder is given power to vary or rescind. It is discretionary in the Court to annul the adjudication: Cullen on Bankruptcy, p. 440, and in the present case the Court, in the exercise of its jurisdiction, should refuse to do so if satisfied on the evidence that an order of adjudication should have been made. [Molony L.J.: Departing from one's dwelling-house, and beginning to keep house, are acts of bankruptcy only when committed by a trader, and it must be shown that he was carrying on trade at the time: *Ex parte M'George, In re Stevens* (1); *Ex parte Schomberg* (2). The debtor here had ceased to trade at the date of the alleged acts.]

O'Brien L.C. :—

This case has occupied us for two days, and there has not been one minute of time wasted, or one unnecessary word said by Mr. M'Gonigal in his very able argument. In the interests of his clients he was bound to defend the decision arrived at by the learned Recorder of Belfast; but the difficulties in his way were immense, and, to my mind, insuperable.

The only trouble I had in the case was with regard to a specific act of bankruptcy, not that on which the debtor was adjudicated, namely, that, being a trader, the debtor had begun to keep house with intent to defeat or delay her creditors; but, as she had ceased to be a trader at the time of the alleged act, this is now admittedly out of the case by reason of the decision of the Court of Appeal in England in *Ex parte M'George, In re Stevens* (1), referred to in the course of the argument by Molony L.J.

The bankrupt in this case, Ursula Radcliffe, seems to have been a singularly honest woman. Unfortunately for herself, she started business in the retail tobacco trade in Belfast at a time when the profits of the retailers were small. She was scrupulously careful to spend as little money as possible on herself, but the circumstances were such that she could not struggle successfully, and finally her health broke down. Six months before leaving this country, finding that she could not carry on her business in Belfast, she contracted to enter into the service of a hotel-keeper in Cheltenham, within some forty miles, as was pointed out during the argument by Ronan L.J., of the principal place of business of the petitioning creditors. In the month of July last she sold her stock and fixtures. The proceeds of the sale, which it would seem was all the money she had in the world, she deposited with Messrs. Wheeler & M'Cutcheon, except a sum of £5 2*s.* 10*d.*, which she retained for her travelling expenses, and her subsistence until her first salary under the situation she had accepted became due. She found that she could not pay her debts in full, and she placed this money in the hands of Messrs. Wheeler & M'Cutcheon for the purpose of being distributed rateably amongst her creditors, that being the manner in which she considered that they should be paid. She shut up her shop, and on the 29th July, 1915, she went to England for the purpose, beyond all question, of taking up the situation which she had agreed to accept six months before. It would be a strange thing if, on these facts, the Court was bound to hold, as an irrebuttable presumption of law, that when she left Ireland for the purpose of taking up a new situation, she left with the intention of defeating or delaying her creditors. The thing is a contradiction in terms.

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(1) 20 Ch. D. 697.

(2) L. R. 10 Ch. 172.

Authorities were cited for the purpose of showing that if it can be proved that the effect of a debtor departing out of Ireland is to prevent process and execution against him by his creditors, the inference must be drawn that he intended to defeat or delay his creditors. There is no such principle of law. The departing may be shown to have been, not with an unlawful, but with an innocent, intent. It is not contended that if this was a case, as at one period of our law it would have been, for submission to a jury, there would be no evidence to go to the jury upon which they could find that the departing was innocent. I must, accordingly, approach the case from the point of view of a jury having evidence before it that the departing was for an innocent purpose.

Of course if there are other circumstances in the case which are such as to show overwhelmingly that the departing was not innocent but guilty, I must hold that there was the guilty intent.

A circumstance relied on is that this woman deposited the money with Messrs. Wheeler & McCutcheon, not to be distributed among her creditors unconditionally, but subject to the condition that they were to accept 6*s.* 8*d.* in the £1 in full discharge. But in this she was guilty of no misconduct either morally or commercially.

With regard to the question of avoiding process, I can find no such intent on the part of this woman. Even apart from the fact that she went to a place about forty miles from a place of business of the petitioning creditors, there is nothing which, to my mind, suggests that she left Ireland for any purpose but to take up this situation in England. How were her creditors placed in a worse position by her going away than if she had remained in Ireland? It has been pointed out by counsel for the respondent that if the debtor had remained in Ireland she could have been adjudicated bankrupt on the petitioning creditors' debt, which is for £46, while under the bankruptcy law in England, which requires a debt of £50, she could not be adjudicated; and it is said that we must take into consideration her knowledge of this difference in the laws of the two countries. I absolutely decline to do so.

It is further said that it is conclusively proved that the debtor had the intention to defeat or delay creditors because she left no address. Here, again, we have a question of fact. So far as the petitioning creditors are concerned, it depends on the evidence of Mr. W. J. Gray, given on the 19th August before the registrar, on the hearing of the application to substitute service of the order of adjudication. The portion of his evidence dealing with this is, "I then [on the 19th August, 1915.] went to the International Hotel. She had resided there up till 26th July. She left on that day, and the hotel people knew nothing of her whereabouts." But this statement is not sufficient. The proper evidence would have been to have called, by subpoena or otherwise, some of the hotel people. In this case, there is a singular lack of the production of the only class of evidence which can be relied on as showing that a person is guilty of what at one time was a crime. That sworn statement of Mr. Gray is open to exactly the same objection as the original evidence on which the adjudication was founded, to which I shall refer hereafter. Moreover, there is an affidavit by the manageress of the hotel, filed for the purpose of this appeal, which positively contradicts Mr. Gray's evidence on this point. I cannot treat that affidavit as waste paper.

There is a matter to which I wish to refer, and to which I referred in a former case (*In re Mackay*) (1), namely, the loose practice which prevails as to the proof to be given to obtain an adjudication. The form of petition for adjudication in this country, though it requires a statement of the petitioning creditor's debt, does not require the act of bankruptcy to be specified on the face of the petition. But the prayer of the petition is that "on proof of the requisites in that behalf on the hearing of this petition the said may be adjudged bankrupt." Accordingly, the Court is bound to have before it proof of "the requisites in that behalf." These requisites, in the case of a creditor's petition, are set out in Rule 29 of the Local Court Rules as follows:—

> At the sitting to adjudicate, the following matters shall be proved, either by affidavit or by *viva voce* examination:—
>
> 1. On the petition of a creditor against a debtor:
>
> Proof of the creditor's debt, and of the act of bankruptcy, including proof of the trading by the debtor when so required by the 21st section of the Act of 1872.
>
> Proof of the debtor's residence or of his having an office or place of business within the jurisdiction of the Court.

Rule 25 provides that, when the petitioning creditor cannot himself verify all the statements contained in the petition, he must file in support of the petition the affidavit of any person who can depose to them.

The adjudicating a person bankrupt, although it does not carry the serious consequences it did a hundred years ago, is still a matter of the greatest importance. It alters a man's status, and may ruin his prospects in life. Before granting an adjudication, there must be the most scrupulous care in seeing that the General Orders are complied with, and that there is proper evidence on which the adjudication can be made.

Now, let me see what was the evidence acted upon in the present case in adjudicating this woman bankrupt.

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(1) [1915] 2 I. R. 347, at p. 353.

The affidavit here is made by a Mr. Birch, who lives in Belfast, and is the manager of a branch office of the petitioning creditors. He states that "the said Ursula Radcliffe was at that time [the 23rd June, 1915] residing at the International Hotel, College Square, East, Belfast, and on or about the 29th day of July I am informed and believe that she departed from the said hotel, and stated that she was leaving Ireland and going to London." He does not pretend to know anything of his own knowledge as to this, and he does not state the grounds of his information and belief. There was a reckless disregard of the rule as to the nature of the evidence required to be given.

It was not contended in this case thas if this was the only evidence of the act of bankruptcy, there was a compliance with the rules. Accordingly Mr. McGonigal was driven to argue another question, namely, whether, on an application such as this, further evidence can be given. I express no opinion as to that. Taking every scrap of the evidence before us in this case, I find nothing which coerces me to hold that this woman left Ireland with intent to defeat or delay her creditors.

The appeal must be allowed with costs.

RONAN L.J. :—

I concur. The acts of bankruptcy dealt with in the argument here, the departing of the debtor from Ireland, the absenting herself from her dwelling-house, and the beginning to keep house, are in themselves absolutely innocent acts. They are only made acts of bankruptcy by the wrongful intention, the intent to defeat or delay creditors; the intention, therefore, is of the essence of the matter, and it is a question of fact. The intention of a person is a state of mind, and, as Lord Bowen has said, the state of a man's mind is as much a question of fact as the state of his digestion : *Edgington* v. *Fitzmaurice* (1). The intent to defeat or delay creditors is therefore a question of fact, and, in my opinion, it must be proved.

It is curious that while under the old statutes of 34 & 35 Hen. 8, c. 4, and 13. Eliz., c. 7, the act must have been done "to the intent or purpose to defraud or hinder any of the creditors of their just debts," the statute of 1 Jas. 1, c. 15, as pointed out in the argument in *Fowler* v. *Padget* (1), after repeating the several acts of bankruptcy declared by the statute of Elizabeth, concludes "to the intent or whereby his creditors may be defeated or delayed." Reading the words "or whereby" in the last-mentioned statute in their literal sense, it would not have been necessary to prove actual intent; it would have been enough to prove that the effect of the act would be to defeat or delay creditors, and it was so held in *Woodier's Case*, referred to in Buller's Nisi Prius, p. 39 (*a*), as follows:—"In the case of Woodier, a mercer on Ludgate Hill, against whom his going beyond the sea being given in evidence, it was insisted that showing *quo animo* it was done (viz. on account of having killed his wife) it could not be considered an act of bankruptcy; but it appearing his creditors were thereby in fact prevented from recovering their debts, Reeves C.J. held it was; but *if that fact had not come out, it would have been otherwise.*" That is, it was held that the word "or" in the statute must be given its literal meaning; but that the intent was not proved, because, if it had been, the Court need not have gone into the other matter.

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(1) 29 Ch. D. 459, at p. 483.

That continued to be the state of the law down to the decision in *Fowler* v. *Padget* (2). In that case it was considered so improper that the question should not turn on the real intent, that the Court decided that, on the true construction of the statute, the words "and whereby" must be substituted for "or whereby," so as to make an actual intent to defeat or delay creditors necessary. There the man left his dwelling-house in Manchester to go to London where he had business, and the creditors were acually delayed. Lord Kenyon in his judgment says (p. 513):—"This is a question of infinite importance, and therefore I wished that the parties would have consented to put it on record, in order that it might be finally decided by a Court of *dernier ressort.* If there had been no decision on the subject, I should have thought very little doubt could have been entertained on the construction of the Act of Parliament. Bankruptcy is considered as a crime, and the bankrupt in the old law is called an offender; but it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea.* The intent and the act must both concur to constitute a crime; and by reading the word "and" for "or" in the statute 1 Jas. 1, c. 15, which is frequently done in the construction of legal instruments where the sense requires it, all difficulty will be removed. But according to the defendant's construction of this Act, every merchant in London might become a bankrupt before to-morrow morning. If the words of the statute are to be taken in their literal sense, any person who happens to go home only for an hour, during which time any creditor calls for payment, and is for that hour delayed, may become a bankrupt; and it would be no answer to such an argument (as was supposed at the Bar) to say that the trader left word where he was gone, because a creditor may have taken out a writ against him in one county, and if he were gone on the borders of the next county, such creditor would in fact be delayed." He then refers to *Woodier's Case* (1) and some other cases.

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(1) 7 T. R. 509, at p. 510.

(2) 7 T. R. 509.

So that in that case, in order to prevent the very construction contended for here, *i.e.*, that it was not necessary to prove the actual intention to defeat or delay creditors, the Court altered the statute by substituting "and" for "or."

I have been trying to find the principle underlying acts of bankruptcy such as we are dealing with here—departing out of Ireland, absenting oneself, and beginning to keep house. Blackstone in three different places gives his definition of a bankrupt. A bankrupt, he says, "is a trader who secretes himself, or does certain other acts tending to defraud his creditors": 2 Bl. Com., pp. 285, 471, 477.

Blackstone enumerates the different acts of bankruptcy, among which he says may be reckoned:—"1. Departing from the realm whereby a man withdraws himself from the *jurisdiction and coercion of the law*, with intent to defraud his creditors. 2. Departing from his own house, with intent to *secrete* himself and avoid his creditors. 3. Keeping in his own house privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause, which is likewise considered to be an intention to defraud his creditors *by avoiding the process of the law.*"

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(1) Bull. N. P. 39 (*a*).

It must be remembered that down to the year 1869 in England, and 1872 in Ireland, a creditor by filing an affidavit could obtain *ex parte* the arrest forthwith of the debtor, and have him kept in jail until judgment or until he gave bail for the amount of the debt. The person of the debtor was the main security for the debt. On account of the power of arrest until judgment, and of imprisonment after judgment until the debt was paid, the creditors were very anxious to know where the debtor was; and therefore in the earlier cases we find great importance attached to any absence of the debtor or to a refusal to receive a creditor. But I cannot believe that at the present time if a lady owes an account to a dressmaker, and the dressmaker sends the bill to her house with a messenger, who is told by the servant that she is "not at home," she can next day be adjudicated a bankrupt without more. A rational meaning must be given to the statute.

The question in the case is whether, taking all the facts into consideration, we are to infer that in leaving Ireland this woman had an *intention of depriving her creditors of any remedy which they would have had if she had remained here.* I am satisfied that she had no such intention. I agree with the Lord Chancellor as to her absolute honesty.

There is, no doubt, the fact that the money she left with Messrs. Wheeler & McCutcheon was to be paid to her creditors only on their giving a release as to the balance, which was a condition she could not insist on, and the creditors were entitled to enforce their debts by action. But I do not think that she had the least intention at any time, by changing her residence, to put her creditors in a worse position as to taking proceedings for enforcing their debts. If that had been her intention, it is certainly a peculiar circumstance that she went to reside in the neighbourhood of the principal place of business of the petitioning creditors, where she could have been sued either in the High-Court or County Court. It is true that in England she could not have been adjudicated bankrupt for this debt, being under £50; but I do not believe that this poor woman knew the difference between the law of bankruptcy in this country and in England, or that this difference was in any way the motive of her departure.

We must look to the real motive. As it was put in *Warner* v.

Barber (1), a man has "a right to go abroad to look after his property. If he went abroad from this motive, though delay was the consequence, yet, if not intended, it is no act of bankruptcy." What is the fact here? Six months before she left Belfast this woman had accepted a situation in England which was to be taken up on the 1st of August, 1915, and was to be her sole means of livelihood. She remained in Belfast until the last possible moment, and then left to go to this situation. Could anyone say, could any jury find, that she left with the intention of defeating or delaying her creditors?

We were strongly pressed by Mr. M'Gonigal with the maxim that this lady "must be presumed to have intended the probable consequence of her acts." What were these consequences? The principal office of the petitioning creditors (the only substantial creditors except Messrs. Wheeler & M'Cutcheon) was at Bristol. She went from Belfast to Cheltenham, about an hour's distance by train from Bristol. She could have been sued in the High Court or in the Gloucester County Court.

She could not have been made a bankrupt, as it required a £50 debt in England instead of the £40 debt here. This last is the only material consequence as to the remedies against her. It was not seriously contended that she had this distinction in her mind. The presumption was, therefore, in this case really non-existent; in any event it was only a rule of evidence, and could be rebutted by evidence.

If it were proved that she had deliberately concealed her address, I should have thought it a very grave matter. I agree with the Lord Chancellor that this has not been proved, and it would take a good deal to convince me that she intended to conceal her address from Mr. Wheeler, who has treated her with so much kindness, and whom she trusted so implicitly.

The cases referred to by Molony L.J. during the argument (which he will deal with) make it unnecessary to consider the other acts of bankruptcy, or the questions arising on sect. 30 of the Act of 1872.

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1) Holt 175.

Molony L.J. :—

The adjudication of a person a bankrupt carries with it consequences of a penal nature, and I agree with the statement of Bacon C.J., in *In re Skelton* (1), that "It is the very gist and essence of the Bankruptcy Act that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act."

In order to give the Court jurisdiction to adjudicate a person a bankrupt, it is essential that circumstances should be shown which bring the case within one of the provisions of sect. 21 of the Bankruptcy (Ireland) Amendment Act, 1872, and consequently rules have been made for that purpose, and a form of petition is given in the schedule to the rules. That form, which is the same in the Local Court as in the High Court, does not require that the petition should set out the particular act of bankruptcy relied on. It is sufficient if it states generally that the debtor has committed an act of bankruptcy within six months before the presentation of the petition, and the petition then prays that "on proof of the requisites in that behalf on the hearing of this petition, the said may be adjudged bankrupt."

What are the requisites, and how are they to be proved? Rule 29 of the Local Court Rules (corresponding with Rule 32 of the Rules of the Supreme Court) provides that at the sitting to adjudicate on a creditor's petition proof must be given, either by affidavit or by viva voce examination, of the creditor's debt, and of the act of bankruptcy, including proof of trading where necessary. Rule 25 of the Local Court Rules (corresponding with Rule 32 of the Rules of the Supreme Court) provides that when the petitioning creditor himself cannot verify all the statements in the petition, he must file in support of the petition the affidavit of a person who can depose to the facts.

Now let us take the present case as it stood on the 18th August, 1915. At that time there was on the files of the court an affidavit of debt made by a Mr. Picken of Bristol, a bookkeeper of the petitioning creditors. That affidavit simply verifies the fact of a debt being due, but it does not appear how the deponent collected his information from the different branches of the business. In proof of the act of bankruptcy, the only evidence the Court had before it was an affidavit made by a Mr. Birch filed on the 18th August. It is admitted here that that affidavit is insufficient to sustain the adjudication, as it is made by a person who had no personal knowledge, but deposes merely from information and belief, and, moreover, does not even state the grounds of his information and belief. This woman was, therefore adjudicated bankrupt without a particle of legal evidence to sustain the adjudication.

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(1) 5 Ch. D. 979, at p. 980.

The only act of bankruptcy suggested in the affidavit of Birch is that the debtor had departed out of Ireland with intent to defeat or delay her creditors, one of the acts of bankruptcy mentioned in sect. 21 of the Act of 1872, and a good deal of discussion has arisen here as to what is necessary to constitute such an act of bankruptcy. We have been asked to hold that if a person departs out of Ireland, and the effect might be to defeat or delay the creditors, the Court must necessarily draw the inference that the intent was to defeat or delay the creditors, although perfectly satisfied that no such intent was present to the mind of the debtor. There is a chain of authority extending over 100 years against such a proposition.

In *Ex parte Mutrie* (1), decided in the year 1800, Lord Loughborough says: "A man goes out of the kingdom with a fair intention, and for a proper purpose. That, it has been long determined, will not be an act of bankruptcy, though creditors are delayed." Then came, in 1816, the case of *Warner* v. *Barber* (2), in which Gibbs C.J. says: "It is undeniable in this case that Pellowe's creditors were delayed. But if there be no intent to delay, the circumstance of departing from the realm, whereby delay is occasioned, is no act of bankruptcy." Then we come down to the case to which I have already referred, *In re Skelton* (3). There Bacon C.J. says: "The fact of the debtor having departed from his dwelling-house in itself announces nothing. He may have gone to bury his wife or his mother, or to a meet of

(1) 5 Ves. Jun. 576.
(2) Holt, 175.
(3) 5 Ch. D. 979.

foxhounds. But that which the law holds, and rightly holds, to be the important fact is, that he has departed 'with intent to defeat or delay his creditors.' If he does it with that intent, it is an act of bankruptcy."

It is admitted here that if we were dependent alone on what was before the Court on the 18th August, 1915, the adjudication could not be sustained. But the debtor showed cause against the adjudication by a notice dated the 11th September, 1915, and filed an affidavit made by her on the 9th September. The matter came before the Recorder on the 20th September. Mr. Birch was examined, and his evidence elaborated his original statement. It is contended by the appellant that we cannot go into this evidence, because the original order for adjudication was made without jurisdiction, and cannot, therefore, be supported by subsequent evidence. On the other hand, Mr. McGonigal contends that the debtor cannot, by delaying to show cause, put herself in a better position than if she had applied under the provisions of sect. 129 of the Act of 1857, in which case the petitioning creditor would have been at liberty to prove another act of bankruptcy sufficient to sustain the adjudication, and he contends that there is evidence of two other sufficient acts of bankruptcy, namely, that being a trader she (1) departed from her dwelling-house, or otherwise absented herself; and (2) had begun to keep house. But it is to be observed that both these acts of bankruptcy are qualified by the words "being a trader," and the case of *Ex parte McGeorge, In re Stevens* (1), following *In re Schomberg* (2), shows that to authorize an adjudication for such an act of bankruptcy it must be shown that the debtor was a trader at the time of the alleged acts. It is quite clear here that on the 26th, 27th, and 28th of July, 1915, when the representatives of the creditors were calling to see her, she had ceased to trade.

This being so, Mr. McGonigal is driven back to his original act of bankruptcy, leaving Ireland with intent to defeat or delay creditors. He claims the benefit of the additional evidence given on the 20th September, 1915, and he says that with the assistance of it he can sustain this act of bankruptcy and the validity of the adjudication.

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(1) 20 Ch. D. 697.

(2) L. R. 10 Ch. 172.

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Molony L.J.

I assume in his favour that he can go into this evidence; but having considered the entire of the evidence given on the 20th September, I agree with the other members of the Court that, so far from establishing that this lady left Ireland with the intention of defeating or delaying her creditors, it clearly shows that she left with the intention of taking up a situation which she had agreed to accept six months before. That her intention was perfectly honest is shown by the fact that before leaving she left in the hands of Messrs. Wheeler & McCutcheon, to be distributed among her creditors, all the money she had in the world, except a sum of £5 2*s.* 10*d.* which was necessary for her railway fare and her subsistence until her first salary should become due.

I am quite satisfied that this lady ought not to have been adjudicated a bankrupt, and that the appeal should be allowed.

Solicitors for the appellant: *Wheeler & McCutcheon.*

Solicitors for the respondents: *Geo. McIldowie & Sons.*

J. G. T.

Appeal.
1915.

Nov. 22, 23, 24.
Dec. 13.

IN RE PATRICK MURRAY (1).

Practice—Bankruptcy—Debtor's Summons—Debtor out of the Jurisdiction—Substitution of Service—Jurisdiction—Trader.

Goods were supplied by F. to M., a trader carrying on business in Ireland. M. sold his business, and left to reside in Scotland, entrusting the collection of his book-debts to his solicitor, R. F. obtained an order for substitution of service on R. of a writ of summons in an action to recover the debt, and subsequently obtained judgment for the debt and costs against M. F. then issued a debtor's summons, and obtained an order from the Court of Bankruptcy for leave to substitute service of the summons on R., which was done, and M., not having complied with the debtor's summons, was adjudicated a bankrupt. On an appeal from an order of Boyd J., disallowing the cause shown by M., against the adjudication:

Held, that as M. was neither carrying on trade nor resident in Ireland, there was no jurisdiction to order substituted service of the debtor's summons, and that the adjudication should be annulled.

This was an appeal from an order of Boyd J., dated the 29th October, 1915, disallowing the cause shown by Patrick Murray against his adjudication in bankruptcy in this matter.

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(1) Before O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Messrs. Fisher & Sons, the petitioning creditors, on the 23rd June, 1915, obtained judgment in the King's Bench Division against Patrick Murray for a sum of £43 11*s.* 9*d.* and £10 18*s.* 4*d.* costs, for goods sold and delivered to him in the year 1914, when he was carrying on business at Castleblayney, county Monaghan. In October, 1914, Murray sold his premises in Castleblayney, with the stock-in-trade, to his two brothers for £1050, and in November, 1914, having executed the deed of conveyance of the said premises, he left Castleblayney for Glasgow, where he had a business. Since that date he had resided at Glasgow, and had not returned to Ireland, the business formerly belonging to him being carried on by his brothers. Murray, when he sold his business, handed over his day-books and ledgers to his solicitor, Mr. J. G. Reid, with instructions to collect his debts and pay the proceeds to his creditors; and Mr. Reid did, in fact, collect certain of Murray's debts, and paid instalments amounting to five shillings in the pound to Murray's creditors. Service of the writ in the action against Murray was by leave of the Court effected by substitution of service on Mr. Reid.

On the 7th July, 1915, particulars of demand were served by Messrs. Fisher & Sons on Murray, directed to his address in Glasgow; and a debtor's summons for recovery of the said judgment debt and costs was issued on the 12th July, 1915, directed to Murray at Castleblayney. By an order of the Court of Bankruptcy, dated the 16th July, 1915, it was directed that service of a sealed copy of the debtor's summons, together with a sealed copy of the said order, to be made personally on the said Mr. J. G. Reid, solicitor for the debtor, should be deemed to be good and sufficient service of the debtor's summons on Murray. The debtor's summons not having been complied with, a petition in bankruptcy was filed by Messrs. Fisher & Sons on the 14th August, 1915; and on the 1st September, 1915, Murray was adjudicated a bankrupt, an order being made by the Court that, in addition to the service of the duplicate order of adjudication on the bankrupt personally, or by leaving the same at his usual or last known place of abode or place of business, a duplicate order of the adjudication should be also served on the said Mr. J. G. Reid. Murray subsequently showed cause against the adjudication, and this having been disallowed, he now appealed.

Appeal.
1915.
In re MURRAY.

Blood K.C., and *F. W. Price*, for the appellant :—

The cause shown by Murray against the adjudication should have been allowed. At the date of the attempted service of the debtor's summons he was neither carrying on trade in Ireland, nor was he resident in Ireland, and the Irish Court of Bankruptcy had accordingly no power to order substitution of service of the debtor's summons. Non-compliance with a debtor's summons within twenty-one days in the case of a non-trader amounts, under sect. 21 (6) of the Bankruptcy (Ireland) Amendment Act, 1872, to an act of bankruptcy, and there is no power to extend the time. Consequently great hardship might ensue to a foreign debtor if this practice of allowing substitution of service of a debtor's summons directed to such a debtor were to be sanctioned. We contend that there was no jurisdiction in the Irish Court empowering this to be done. In *Ex parte O'Loghlen, In re O'Loghlen* (1), it was held that on the true construction of the English Bankruptcy Act of 1869, and the General Order of January, 1870, a debtor's summons could not be served out of the jurisdiction. James L.J. there said: "I am of opinion that the English Court of Bankruptcy has no jurisdiction over a man *de facto* living in Ireland, and having neither *de facto*, nor in the contemplation of the law, any residence here." Nothing in the Irish statutes or rules confers a larger jurisdiction on the Irish Court. Sec. 309 of the Irish Bankruptcy and Insolvent Act, 1857, provided for substitution of service when a person was keeping out of the way, and could not be served personally. Sec. 124 of the Bankruptcy (Ireland) Amendment Act, 1872, empowered the judges of the Court to make general rules for the effectual execution of the Act, and enacted that any general rule might prescribe regulations as to the service of summonses and orders, " including provisions for substituted service." The Rules of the Supreme Court (Ireland), 1905, now regulate all proceedings in bankruptcy in Ireland. Order 88, Rule 19, provides that a debtor's summons is to be served personally, or by substitution of service as mentioned, where the Court is satisfied that a debtor is keeping out of the way to evade service, or that from any other cause prompt

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(1) L. R. 6 Ch. 406.

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personal service cannot be effected. Order 88, Rule 95, enacts that "the provisions of Order 9, Rule 5, *so far as applicable*, shall apply in all proceedings under the rules of this order." There is no suggestion here that Murray is keeping out of the way to evade service, and, allowing the fullest effect to the incorporation into the existing bankruptcy rules of Order 9, Rule 5, it is clear that, as this was not a case in which an order could have been made for service out of the jurisdiction of the debtor's summons, substitution of service could not be directed. This would be to do indirectly what could not be done directly: *O'Connor* v. *Star Newspaper Company* (1). In *In re Hodges* (2), where a debtor's summons was taken out in the name of the secretary of a limited company for a debt due to the company, Lord Selborne L.C. said:—"This summons is a special statutory proceeding, involving important consequences, and all proper forms must be strictly complied with. The appeal must be allowed, and the summons dismissed with costs."

In *Ex parte Blain; In re Sawers* (3), it was decided that the English Court of Bankruptcy will not make an order for service out of the jurisdiction of a bankruptcy petition on a foreigner, though a member of an English firm which has traded and contracted debts in England, and against which an execution in respect of a judgment debt had been levied by seizure and sale of goods of the firm in England. [They also referred to *In re Pearson* (4), *Ex parte Crispin, In re Crispin* (5).]

Hanna K.C., and *Cusack*, for the respondents:—

If the appeal succeeds, the respondents will be left without a remedy; they cannot take bankruptcy proceedings in Scotland. Murray himself has acknowledged the jurisdiction of the Irish Courts. No steps were taken by him to set aside the order for substitution of the service of the writ of summons for the debt. No doubt substitution of service under sect. 309 of the Act of 1857 could be effected only when the debtor was keeping out of the way; but Order 88 goes much further. It expressly incorporates Order 9, Rule 5, dealing with substitution of service. *O'Connor* v. *Star Newspaper Company* (1) has no application. Murray could have been served personally out of the jurisdiction without an order of the Court. At the date of the service of the debtor's summons, Murray was still a trader within the jurisdiction of the Irish Court. In *O'Loghlen's Case* (2) the debtor was a non-trader, who had no residence in England. Here Murray, if resident in Scotland, was still a trader in Ireland. He had contracted trade debts in this country which remained unpaid, and his agent, Mr. Reid, was still engaged in collecting his book-debts. He was, therefore, answerable to the bankruptcy jurisdiction in Ireland: *Dewdney, Ex parte*; *Seaman, Ex parte* (3); *Stronge* v. *Hawkes* (4); *Ex parte Griffiths* (5); *In re Reynolds*; *Ex parte White Brothers, Limited* (6); *In re Clark*; *Ex parte Pope and Owles* (7).

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(1) 30 L. R. Ir. 1.
(2) L. R. 8 Ch. 204.
(3) 12 Ch. D. 522.
(4) [1892] 2 Q. B. 263.
(5) L. R. 8 Ch. 374.

[The following cases were also cited and discussed:—*Ex parte Schomberg* (8): *Ex parte M'George*; *In re Stevens* (9); *In re Rogers* (10); *In re Sanderson* (11); *In re Hazleton, a Bankrupt* (12); *Lewis* v. *Herbert* (13); *Bailie* v. *Grant* (14).]

Blood K.C., in reply.

Cur. adv. vult.

Dec. 13.

O'BRIEN L.C.:—Lord Justice Molony will deliver the judgment of the Court.

MOLONY L.J.:—

This is an appeal from an order of Mr. Justice Boyd, dated the 29th October, 1915, disallowing the cause shown against the adjudication in bankruptcy of Patrick Murray.

It appears that Patrick Murray had been a publican carrying on business in Castleblayney up to October, 1914, when he sold his premises to his two brothers, and left for Glasgow in the

(1) 30 L. R. Ir. 1.
(2) L. R. 6 Ch. 406.
(3) 15 Ves. 479.
(4) 3 De G. & J. 70.
(5) 3 De G. M. & G. 174.
(6) [1915] 2 K. B. 186.
(7) [1914] 3 K. B. 1095.
(8) L. R. 10 Ch. 172.
(9) 20 Ch. D. 697.
(10) 9 Ir. Ch. Rep. 150.
(11) 11 Ir. Ch. Rep. 421.
(12) 49 I. L. T. R. 29.
(13) 16 L. R. Ir. 340.
(14) 9 Bing. 121.

following month, where he has since resided. There were some book-debts due to him, and he handed over the collection of these to Mr. J. G. Reid, solicitor, of Castleblayney, who proceeded to collect same, and he has paid sums amounting to 5*s*. in the pound to the creditors. Messrs. Joseph Fisher & Sons, the petitioning creditors, who had supplied coal to the debtor to the amount of £43 11*s*. 9*d*., did not accept any composition from Mr. Reid, but on the 6th May, 1915, issued a writ in the King's Bench Division for recovery of the amount due to them. An order was obtained for substitution of service of the writ on Mr. Reid, and judgment was ultimately marked for the said sum of £43 11*s*. 9*d*., and £10 18*s*. 4*d*. costs, making together £54 10*s*. 1*d*. The petitioning creditors then served particulars of demand on the debtor directed to his address at 206 Cambridge Street, Glasgow, and on the 12th July, 1915, they issued the debtor's summons in this matter directed to the debtor at Castleblayney, ignoring his Scottish address.

It is admitted that at the time of the issue of the debtor's summons the debtor had left Ireland for eight months, and had no residence or place of business within the jurisdiction, and I am satisfied on the authorities that he was not then a trader in Ireland.

The debtor's summons having been issued on the 12th July, 1915, an application was made to Mr. Justice Ross for leave to substitute service of same by serving Mr. Reid, and an order was made accordingly by the judge, and on the 1st September, 1915, the debtor was adjudicated a bankrupt. On the 29th October, 1915, an application was made to Mr. Justice Boyd showing cause against the adjudication, on the ground of the invalidity of the service, and Mr. Justice Boyd held that the order of Mr. Justice Ross giving leave to substitute service on Mr. Reid was good, and consequently he disallowed the cause shown.

It is desirable to trace shortly the history of the procedure by debtor's summons in Ireland.

The debtor's summons was instituted in Ireland by the 12th & 13th Vict. c. 107, and was at first confined to traders. Sect. 11 of that statute required delivery to the debtor personally of the particulars of demand, and authorized the issue of a summons, which must also, under sect. 13, have been served personally. This continued to be the practice until the passing of 20 & 21 Vict. c. 60, which by sect. 105 enabled the particulars of demand to be delivered either to the trader personally "or to some adult inmate at his usual or last-known place of abode or business," but personal service of the summons was required under sect. 108. Rule 38 of the General Orders further required that the summons should be served between 8 o'clock in the morning and 8 o'clock in the evening.

This continued to be the law until the passing of 35 & 36 Vict. c. 58, which first extended the jurisdiction of debtors' summonses to non-traders. Sect. 21, sub-s. 6, makes it an act of bankruptcy for a debtor who has been served in the prescribed manner with a debtor's summons, and who has, if a trader, for the space of seven days, or not being a trader, has for the space of three weeks, neglected to pay or secure the sum due. The mode of service was prescribed by Order XXII of the General Orders of the 20th December, 1872, by which order it was provided that the debtor's summons was to be personally served within twenty-one days from the date of the summons, and if personal service could not be effected, the Court might (*a*) grant an extension of the time for service; (*b*) if the Court was satisfied by affidavit that the debtor was *keeping out of the way* to avoid such service, it might have ordered service to be made by delivery of the summons to some adult inmate at his usual or *last-known place* of residence *or business*; and (*c*) it might have ordered that notice of the granting of the summons in the prescribed form be gazetted, and that the publication of the gazette should be deemed to be service. Sect. 21 of the Irish Act corresponds with sect. 6 of the English Bankruptcy Act of 1869, and the general order made under that Act corresponds with the Irish order.

The effect of the statute was considered in the case of *Ex parte O'Loghlen* (1), and it was held that upon the true construction of the Bankruptcy Act of 1869, and the general order of January, 1870, a debtor's summons could not be served out of the jurisdiction.

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(1) L. R. 6 Ch. 406.

Mellish L.J. sums up the effect of the order as follows:— "If personal service cannot be effected, the Court may grant an extension of time; but it *can order substituted service only* in cases where *the debtor is keeping out of the way to avoid service*; and this cannot be said of a person who was out of England *when the summons was issued*; and the reference to the usual or last-known place of residence or business evidently means in England. It seems to me that, on the true construction of the Act and rules, the summons can only be served in England. I do not see that any great injustice can be done by this; for if a person, in order to defeat his creditors, leaves England, or, being a trader, keeps abroad, he thereby commits an act of bankruptcy. But if a person is abroad because his usual place of residence is abroad, I do not think that the Legislature intended him to be made bankrupt here."

By the Bankruptcy Act, 1883, the debtor's summons was abolished in England, and there was substituted for it a bankruptcy notice, limited to judgment debts, which could be served on the judgment debtor in England "or by leave of the Court elsewhere" (sect. 4, sub-s. 1 (*g*)). When service could be ordered abroad it was obviously necessary to give power to extend the time for complying with the requirements of the notice, and consequently the section provides that the notice is to be complied with "within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service." This sub-section is repealed, but re-enacted by sect. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914.

Section 21 of the Bankruptcy (Ireland) Act, 1872, has never been altered, and under it there is no express power given to serve out of Ireland, and there is no power in the Court to extend the time within which the requirements of the summons must be complied with.

The Court of Bankruptcy was incorporated with the then Queen's Bench Division by the Supreme Court of Judicature (Ireland) No. 2 Act, 1897, and sect. 3 of that Act provides that all rules and orders to be made after the passing of the Act in reference to bankruptcy jurisdiction shall be made and altered by

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the authorities in that behalf provided by the Judicature Acts, with a further proviso that the existing rules and orders in bankruptcy shall remain in force until altered. The King's Bench Division (in Bankruptcy) is now governed by the rules of the Supreme Court, Ireland, 1905. Order 88, rule 19, substantially follows Order 22 of the rules of 1872, with the further provision that the Court may "make such order for substituted or other service, or for the substitution for service of notice by letter, public advertisement or otherwise as may be just." Order 88, rule 95, provides that the provision of Order 9, rule 5, so far as applicable, shall apply in all proceedings under the rules of the said order. Order 9, rule 5, is really a repetition of the addition which was made to Order 88, rule 19, and provides that if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, or such other service as is prescribed by these rules, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just; provided that where the defendant is resident out of the jurisdiction the provisions of rule 2 of Order 11 shall apply. Order 11 provides for service out of the jurisdiction of a writ of summons in certain specified cases, but no order provides, or could, in my opinion, legally provide, for such service of a debtor's summons.

It was contended, however, on behalf of the petitioning creditors that there was full power to serve a debtor's summons out of the jurisdiction without any order of the Court, but this is opposed to the whole current of authority.

It was next contended that even although the debtor's summons could not be served outside the jurisdiction, there was full power to substitute service within the jurisdiction, and Order 9, rule 5, was strongly relied on. This rule was, however, fully considered in the case of *O'Connor* v. *The Star Newspaper Company, Ltd.* (1), which decided that service of a writ of summons on a defendant *resident out of the jurisdiction* could only be substituted *by service on his agent within the jurisdiction* in the cases in which under Order 11, rule 1, service out of the jurisdiction may be allowed.

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(1) 30 L. R. Ir. 1.

If in the present case no order could be made to serve the debtor personally in Glasgow, it is impossible validly to substitute service under Order 9, rule 5, on his supposed agent in Castleblayney.

Mr. Hanna next relied on the provisions of Order 88, rule 19. It cannot, however, be suggested that the debtor was keeping out of the way to avoid service, or that there would have been the slightest difficulty in serving him personally in Glasgow, if the Court could legally have ordered such service to be effected. This case does not come within the provisions of Order 88, rule 19; and the order to substitute service was, in my opinion, made without jurisdiction.

I am, therefore, of opinion that there was no valid service of the debtor's summons, and that consequently the cause shown against the adjudication should have been allowed.

I am not, however, to be taken as expressing any opinion that, if the Court was satisfied by the evidence that the debtor went out of Ireland with the express object of evading service, an order for substituted service might not be made under the provisions of Order 88, rule 19. It was decided by the Court of Appeal in England in *In re Urquhart*, *Ex parte Urquhart* (1), that under rule 154 of the Bankruptcy Rules of 1886 an order for substituted service of a bankruptcy notice or petition might be made, notwithstanding that the debtor was out of the jurisdiction, if the Court was satisfied by the evidence that he went out of the jurisdiction in order to evade service. Rule 154 of the Bankruptcy Rules of 1886 (now rule 156 of the Bankruptcy Rules of 1915) is very similar to our Order 88, rule 19; but it is to be observed that there is power in England to serve a bankruptcy notice or petition out of the jurisdiction under sect. 4, sub-s. 1 (*g*) of the Bankruptcy Act (now sect. 1, sub-s. 1 (9) of the Bankruptcy Act, 1914), and rule 156 of the Bankruptcy Rules of 1886 (now rule 158 of the Bankruptcy Rules of 1915), while there is no similar provision in Ireland as regards a debtor's summons.

There are also other differences in the two procedures which will have to be considered if the net question ever arises for judicial decision.

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(1) 24 Q. B. D. 723.

O'BRIEN L.C. :—

I have had the advantage of reading the judgment which has been delivered by Molony L.J., and I entirely agree in the conclusion at which he has arrived, and in the reasoning which has led him to that conclusion. As the case, however, is of some importance, I desire to add a few words on one branch which has been pressed very strongly upon us in argument. In agreeing with the judgment which has been read, I wish to say that I should have preferred, if I could have done so, to have arrived at a different conclusion, because I cannot help thinking that, from a commercial point of view, it is an unsatisfactory state of our law that there should be an existing jurisdiction in the English Courts, which permits the service of bankruptcy notices out of the jurisdiction, while, at the same time, there is no corresponding jurisdiction, as I consider clear, in this country with regard to a debtor's summons. It is not, however, for the Court to frame the law; the law is framed by the Legislature, and we must only give effect to it as we find it. I also wish to lay emphasis on this, that (as Molony L.J. is of opinion, and I agree in that opinion) not only had the debtor in the present case no residence in Ireland, but, at the time of the service, or attempted service, by substitution of the debtor's summons, he was not a trader in Ireland. I repeat that I wish to lay emphasis on this double finding. I conceive that *Sir Coleman O'Loghlen's Case* (1) is an authority for the proposition that in the case of a non-trader who is resident out of the jurisdiction, or domiciled out of the jurisdiction, there is no power in this country to substitute service of a debtor's summons by serving out of the jurisdiction. That case is unquestionably still law, at any rate so far as it bears on the facts of the present case, although it undoubtedly went too far in some respects, as was admitted in subsequent cases by the learned judges themselves who decided it, in particular in the expressions of opinion that were given as to the service of bankruptcy proceedings on foreigners if they should happen to be temporarily resident in England at the time when the bankruptcy proceedings were instituted.

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(1) L. R. 6 Ch. 406.

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Now, it is to be noticed that, although at the time when *O'Loghlen's Case* (1) was decided, bankruptcy jurisdiction affecting non-traders had been introduced in England, such jurisdiction in Ireland was only enacted in 1872, and, having regard to the earlier decisions as to the exercise of the jurisdiction of the English Courts over Irish subjects temporarily resident in England, it would have been an unfortunate condition of things that bankruptcy jurisdiction could have been exercised over an Irish non-trader, who could not at that time have been adjudicated a bankrupt in Ireland. Accordingly, the case on that point is clear, and was undoubtedly conclusive down to the time when the Irish Bankruptcy Court was absorbed into the King's Bench Division, save as to the local Bankruptcy Courts at present in Cork and Belfast.

But the argument was pressed very strongly upon us by Mr. Hanna that *O'Loghlen's Case* (1) is not necessarily an authority when you have a debtor who is resident out of the jurisdiction, but who is continuously carrying on business within the jurisdiction. All I wish to say at present as to this is that, neither actually nor constructively, was the debtor carrying on business in Ireland at the time of the attempted service of the debtor's summons. This question arose incidentally in another case which was before us recently, and in that case I and, I think, the other members of the Court, were of opinion that the debtor did not satisfy the condition prescribed by the statute as being a trader at the time when the alleged act of bankruptcy was committed (2). The question has been more elaborately argued in the present case, and we were pressed with the view that it is almost a conclusion of law that if there are debts contracted by a man who is a trader, he could be adjudicated as a trader, even at a time when, in ordinary language at any rate, he had ceased to be a trader, and it was pressed on us that, as there were here debts in existence which were contracted by the debtor when he undoubtedly was carrying on trade in Ireland, on the analogy of a decision with regard to a married woman (*In re Reynolds; Ex parte White Bros., Limited* (3)), he must still be considered as being a trader for the purposes of proceedings in bankruptcy

(1) L. R. 6 Ch. 406. (2) *In re Radcliffe*, ante, p. 534. (3) [1915] 2 K. B. 286.

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against him by debtor's summons. I wish, so far as I am concerned, that there should be no doubt on this question. There is no doubt whatsoever that at a time when non-traders could not be made bankrupt, cases arose in which it was held that when debts had been contracted by a trader he might still remain technically a trader, although he had ceased carrying on trade. It is sufficient merely to refer to *Dewdney, Ex parte*; *Seaman, Ex parte* (1); *Stronge* v. *Hawkes* (2); and *Ex parte Griffiths* (3). It is manifest that, if the Courts had held otherwise, as the law stood at that time a man might have readily altogether escaped the bankruptcy jurisdiction and the remedies which that jurisdiction gave to creditors; but even at that date it was decided in a series of cases that the question was always one of fact, and not a conclusion of law; and the mere fact that there was a debt due at the time when bankruptcy proceedings were taken might not, as it seems to me, have necessarily in every case determined the question.

Now, the law on the subject was settled by the decision in *Ex parte Salaman*, *In re Taylor* (4), which came before the Court of Appeal in England as an appeal from the Registrar, acting as Chief Judge in Bankruptcy. The head-note is as follows: "If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the Bankruptcy Act."

The case of *Ex parte M'George* (5), which we were invited to disregard during the argument in the present case, was cited by Mr. Winslow Q.C. for the appellants. "It is a question of intention." He said, "If it is once shown that a debtor has been a trader, the onus is on him to show that he has ceased to be a trader." Willis, for the debtor, argued that "the onus is on the appellants to show that the debtor was a trader at the time when the alleged act of bankruptcy was committed."

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(1) 15 Ves. 479.

(2) 3 De G. & J. 70.

(3) 3 De G. M. & G. 174.

(4) 21 Ch. D. 394.

(5) 20 Ch. D. 697.

Jessel M.R. says:—"This is an appeal from the decision of Mr. Registrar Pepys, that the respondent was not a trader at the time when the debtor's summons was served on him by the appellants. This is a mere question of fact—Was he or was he not a trader at that time? The law relating to the subject is very old, and, to show what it is, it is only necessary for me to read two sentences from two judgments of Lord Eldon. In *Ex parte Paterson* (1), he said, 'It is a question for a jury whether there was an entire cessation of trading, or merely an interruption with an intention of resuming it when an opportunity should offer.' And in *Ex parte Cundy* (2), he said, 'His merely quitting the trade of a carpenter will not exempt him from the bankrupt laws, unless it were done with the object of absolutely abandoning it, and completely detaching from himself the character of a trader.'" It is clear from this case that the onus is not discharged by the mere proof of the existence of a debt contracted before business was given up. It must be remembered that the whole aspect of the situation was altered by the Act of 1869; once a non-trader could be made a bankrupt—while of course there still remained certain acts of bankruptcy which could only be committed by a trader—the mischief which was aimed at by the earlier decisions became, to a great extent at any rate, non-existent.

In *In re Reynolds* (3) there was undoubtedy a debt due at the date of the bankruptcy proceedings. The head-note is as follows:—

"An order, dated the 27th of June, was made in the bankruptcy of *A*, declaring a setlement void against *G*, his trustee in bankruptcy, and directing enquiries as to the moneys received by the trustees under the settlement, and payment thereof to *G*. The debtor was one of the trustees of the settlement, and when examined in the bankruptcy of *A*, had admitted the receipt of funds under the settlement; but no enquiry had been made under the order of the 27th of June. *G* presented a petition in bankruptcy against the debtor. Held, that till the amount which the debtor had received was ascertained by enquiry and default made in payment on a day named, there was no sufficient petitioning creditor's debt."

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(1) 1 Rose 405.

(2) 2 Rose 358.

(3) 52 L. J. Ch. 431.

"The debtor, an auctioneer and valuer, by deed assigned his business, goodwill, and premises to a purchaser, and covenanted not to carry on business within certain limits, and afterwards on the same day departed from his dwelling-house. Held, that on the execution of the deed of assignment, the debtor had ceased to be a trader."

In giving judgment on this branch of the case, Bacon C.J. said: "As to the act of bankruptcy, the evidence is a little confusing between the statements of the clerk and Mr. Woolford. But, according to both of them, an agreement had been made by Woolford with Reynolds to buy his business, and he paid him £100 as a deposit. It was not till some time after that that the deed of the 4th of October was executed, but the terms were fully agreed on; and, according to Mr. Woolford's statement of those terms, he was to pay £200 at the end of the first year, and the rest of the purchase-money in the course of some years at the rate of £100 a year; and then a deed was executed by the parties which is clear and explicit. It provides that, up to the 4th of October, Reynolds was to be the owner of the property which he agreed to assign, but, from the execution of the deed, all that was Reynolds's was to become the property of Woolford, and Reynolds had no property whatever remaining in the parcels mentioned in the assignment. On the same day, though on this the evidence is a little obscure, he departed from his dwelling-house—not that it is necessary to consider that at present—he departed from his dwelling-house, no doubt. *But from the moment he had executed the deed, he had divested himself of the character of a trader.* He was a trader no longer. Can I say he was a trader till 12 o'clock that night, notwithstanding the execution of that deed? I say he had ceased to be a trader, and was not within the meaning of the Act of Parliament a trader when he departed from his dwelling-house.

Again, in *Dawe* v. *Vergara* (1), the facts were as follows:—(I read from the head-note) *E. & F.* being in partnership as wine merchants, *F.* brought an action in the Chancery Division for a dissolution of the partnership, and an order was made by the Court for a dissolution, and the appointment of a receiver, under which a receiver took possession of the partnership effects, and carried on the business, *F.* ceasing to take any part in the business, and having no other occupation than that of book-keeper to a trading company. An action having been commenced against *E.* and *F.* upon bills accepted by the firm before the receiver took possession, judgment was signed against *F*, and his separate property taken in execution for a sum exceeding £50. It was held that *F.* was not at the time of the execution a "trader" within the meaning of sect. 87 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. *Ex parte M'George* (1) was there also cited. Pollock B., in giving judgment, said:—"I am of opinion that our judgment must be for the defendant. . . . In the absence of anything to show that Festing intended to reconstitute his business or to carry it on after the completion of the proceedings in Court, I think it is impossible for us to say that he was a trader at the time when his goods were taken in execution. The execution was not, therefore, such as is described in sect. 7 of the Bankruptcy Act, 1869, and as against the trustee the execution creditor is entitled to the goods."

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(1) 11 Q. B. D. 241.

The case of *Ex parte Bailey*, *In re Jecks* (2) came before the Court after the passing of the Act of 1869, and is of some assistance. It was there held that an execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy, is entitled to the proceeds of them as against the trustee; but the further question as to the debtor being a trader was also argued, it being contended that at the time the Bankruptcy Act came into operation he had ceased to be a trader, and that the Act was not retrospective. Bacon C.J., in the course of his judgment on this part of the case, said:—"Then as to the point of the debt or some part of it having been contracted while the debtor was a trader, I am of opinion that the existing statute has, in this respect, no retrospective operation, and that it speaks of and refers only to such persons as, at the time of its commencement, were, or should afterwards become, traders."

(1) 20 Ch. D. 697.

(2) L. R. 13 Eq. 314.

Accordingly, whether I take the law as I find it before the Act of 1869, or consider the special words of that Act, "being a trader," which are the words in the Irish Act also, it is clear to my mind that the mere existence of a debt contracted by a debtor while in trade did not prevent the Court from holding, as it did hold in several of the cases cited, that he had ceased to be a trader. In the present case, then, believing as I do the evidence of this man that he had sold his premises and business, and that he had ceased to be a trader in fact, I must, having regard to the words of our Bankruptcy Act of 1872, hold that he had ceased to be a trader for the purposes of this procedure by debtor's summons at the time of the attempted service.

Mr. Hanna has further contended that there was a settled practice in the Bankruptcy Court in his favour, and, lest there should be any doubt on the subject, we sent for the Chief Registrar, and also the Chief Clerk, whose experience in this matter extends over many years, and they assure us that since *O'Loghlen's Case* was decided down to the time when the Judicature Rule was enacted, there had been no case in which the Court of Bankruptcy had attempted to exercise this jurisdiction. Since then there appeared to have been four or five cases in which the judge may or may not have thought that the jurisdiction of the Court was extended by reason of the rule, but these cases may have been rightly decided on other grounds. In so far as they may have been decided on the assumption that the jurisdiction of the Court of Bankruptcy in this matter of service out of the jurisdiction was extended, they were in my opinion wrongly decided. Now, the Irish Act absorbing the Bankruptcy Court into the King's Bench Division was most guarded in the manner in which this operation was performed. Sect. 3, sub-sect. 1, of the Supreme Court of Judicature (Ireland) (No. 2) Act, 1897, provides "the office of judge of the Court of Bankruptcy shall be abolished, and that Court shall be united and consolidated with the Supreme Court, and all jurisdiction and powers of the Court of Bankruptcy, under any Act or otherwise, and of the judges thereof or of either of them, shall vest in and be exercised by the High Court, and all causes and matters pending in the Court of Bankruptcy, or which would have been within the cognizance of that Court if this Act had not passed, shall be assigned to the Queen's Bench Division."

It may well be that the effect of that amalgamation was merely to vest the jurisdiction of the bankruptcy judges in its limited form in the judges of the High Court acting as judges of the Bankruptcy Court within that limited jurisdiction, while of course they have got as judges of the High Court very wide jurisdiction exercisable outside of bankruptcy proceedings. It may be that the effect is not to do anything more than enable them to exercise the jurisdiction of the Bankruptcy Court, not in any way to extend it. It is to be observed that we in this country have got two County Courts with bankruptcy jurisdiction, and when the English Act of 1883 was passed, the sections were most carefully framed with regard to the conferring of jurisdiction, and when dealing with the County Courts, express jurisdiction was given in regard to the exercise of certain of the powers vested in the judges of the English King's Bench Division. I wish to express no definite opinion upon this question, but it may be a matter not to be lost sight of by those exercising the powers given to the bankruptcy judge by the Acts of 1857 and 1872.

Solicitors for the appellant: *W. G. Bradley & Sons.*

Solicitors for the respondent: *Hunter & Burland.*

R. ST. J. C.

H. L.
1916.
April 11.

CONSIDINE AND ANOTHER, APPELLANTS; M'INERNEY, RESPONDENT (1).

Workmen's Compensation—Amount of Weekly Payment—" Payment, allowance, or benefit"—Civil Servant—Superannuation Allowance and Gratuity under Superannuation Acts, 1834–1909—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 9; *Sched. I., par.* 3.

APPEAL from an order of the Court of Appeal reported *ante,* p. 193.

The Solicitor-General for Ireland (*James O'Connor K.C.*), and *G. A. H. Branson* (of the English Bar) (with them *John M. FitzGerald*), for the appellants.

E. A. Swayne, for the respondent.

The House of Lords reversed the order of the Court of Appeal, and restored the award of the Recorder of Dublin (2).

Solicitor for the appellants: *Treasury Solicitor*, for *Treasury Solicitor in Ireland.*

Solicitor for respondent: *Herbert Z. Deane*, for *James R. Cresswell.*

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(1) *Present*: LORD BUCKMASTER L.C., EARL LOREBURN, LORD ATKINSON and LORD SHAW OF DUNFERMLINE.

(2) [1916] A. C. 162.

THE KING (HOREY) *v.* THE JUSTICES OF KING'S COUNTY (1).

K. B. Div.
1915.
Dec. 14, 20.

Appeal.
1916.
May 21.

Justices — Local Government — Road Materials — Order authorizing Road Authority to enter on Lands not in Occupation of Person from whose Lands the Road Materials are to be taken — Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *s.* 162.

Justices have no jurisdiction under s. 162 of the Grand Jury (Ireland) Act, 1836, to make an order authorizing a road authority to enter on the lands of A for the purpose of obtaining road materials from a quarry on the lands of B, although the only convenient access to such quarry from the public road is through the lands of A.

Certiorari.

This was an application on behalf of the prosecutor, Martin Horey, to make absolute, notwithstanding cause shown, a conditional order for a writ of certiorari to remove and quash an order of the justices at petty sessions purporting to be made under sect. 162 of the Grand Jury (Ireland) Act, 1836, upon a summons issued by the Birr Urban District Council against the prosecutor and one Elizabeth Ferns. The order of the justices was as follows:—

"Whereas the Birr Urban District Council have had transferred to them and have undertaken the entire maintenance of the roads within the said district in pursuance of sect. 27 of the Local Government (Ireland) Act, 1898; and whereas it has been proved to the satisfaction of us, the undersigned justices of the peace, that gravel, stones, sand, or other material wanted for the repair of the said roads cannot be conveniently procured elsewhere than in a certain field, now in the occupation of the said Elizabeth Ferns, of Clonoghill Upper in the said county, in which there is now an open quarry, and that the ordinary and only convenient and reasonable entrance to the said field and quarry for the purpose of entering and carrying away such materials is through a certain other field, intervening between the said quarry and the public road, now in the occupation of the said Martin Horey, of Clonoghill Upper, aforesaid, both which fields are part of the lands of Clonoghill Upper, aforesaid, in the said county, and are not a deer park, bleach green, walled garden, haggard or yard, or planted walk, lawn, or avenue to a mansion house, Now, we, the undersigned justices of the peace, in pursuance and exercise of the power and authority in that behalf given to us by the 162nd section of the said Act, 6 & 7 Wm. 4, c. 116, and sect. 27 of the said Act 61 & 62 Vict. c. 37, do hereby authorize the said Birr Urban District Council during the period of three years from the date of this order, should they so long continue to undertake the maintenance of the said roads as aforesaid, or for such portion of the said period as they shall continue as aforesaid, to enter with their assistants into the said two fields, part of the said lands of Clonoghill Upper, now in the occupation of the said Martin Horey and Elizabeth Ferns hereinbefore mentioned, for the purpose of digging for raising and carrying away in and out of the said field in which the said quarry is situate, any gravel, stones, sand, or other materials wanted for the repair of the said roads during the said period so as aforesaid specified, or for such portion thereof as they may continue to undertake the maintenance of the said road as aforesaid."

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(1) In the King's Bench Division, before Gibson and Kenny JJ.

No objection was made by Elizabeth Ferns to the taking of materials from the quarry on her lands, but the prosecutor, Martin Horey, obtained a conditional order for a writ of certiorari to quash the order of the justices on the ground that it was bad on its face and made without jurisdiction, inasmuch as (*a*) at the time the said order was made there were to the knowledge of the magistrates none of the materials mentioned in sect. 162 of the Grand Jury Act, 1836, on the lands of the said Martin Horey, and that the said order in effect purported to be a grant of a right of way across the lands of Martin Horey to the lands of Elizabeth Ferns, on whose lands the said materials were; (*b*) that the said order prescribed a route by which the complainants should go to and from the quarry mentioned in the order.

From the affidavits filed in the matter, it appeared that there was no quarry on the prosecutor's lands; that the quarry mentioned in the order of the justices was on lands in the occupation of Elizabeth Ferns, and the distance from it to the public road was 230 yards; that there was no convenient exit from the quarry to the public road except through the lands of the prosecutor; that Elizabeth Ferns had no lands intervening between the quarry and the public road, and that the stones and materials from the said quarry could not conveniently be carried away for the purpose of repairing the roads retained by the Urban District except through the lands of the prosecutor.

Carrigan K.C. and *William Shannon*, for the prosecutor.

Denning K.C. and *Price*, for the Birr Urban District Council.

GIBSON J.:— Dec. 20.

Up to the present, sect. 162 of the Grand Jury Act has not been applied, for the purpose of passage only, against an occupier from whose lands the road materials are not taken. Sect. 162 only prescribes a justice's order where the occupiers do not consent. Here Mrs. Ferns, the quarry occupier, did not object, and, though she is joined in the order, the case is in the same position as if Horey alone was named. Quarries and gravel-pits are usually accessible from a highway or other lawful means of approach, and the word "conveniently" points to something of the kind. The term "search," found in some of the English statutes, does not occur in the section, which appears to contemplate known and proved sources of quarry or gravel supply rather than exploratory operations. If the ground to be quarried was shut in by premises of the excepted class, it could not be reached conveniently or at all. The prima facie object of the section as to quarries is to deal with accessible lands in the same occupation as to which there is to be one assessment of damages. There is, no doubt, force in Mr. Denning's argument that it would be convenient that a right of passage should be enforced in certain circumstances against a neighbouring occupier; but the narrower construction has not given rise to any practical difficulty. If his argument is correct, a contractor, where a quarry was approached by a longer way, might ask for an order under which he could make a shorter passage through neighbouring lands: *Boyfield* v. *Porter* (1).

The first statute in pari materia is 26 Geo. 3, c. 14 (Irish). Under sects. 49 to 52 there is a right to the value of the materials as well as to surface damages. The person who, under sect. 52, is to get the compensation is the occupier of the land from which the materials are drawn, which would exclude such an adjacent occupier as Horey from the operation of the section. 36 Geo. 3, c. 55, s. 62 (Irish), is on the lines of the Grand Jury Act. The English Highway Act, 1835, c. 50, contains two sets of provisions. Sect. 51 relates to waste lands, and sects. 53 and 54 deal with enclosed lands. Under these latter sections the owner and occupier must get notice; the decision of the Court is required; and the frame of the sections and the form of licence (No. 10 in Schedule) seem directed rather to persons immediately owning the premises operated on than to outside persons. It is not necessary to determine the construction of this statute. The earlier English legislation differs in plan and language from our sect. 162.

Sect. 162 is loosely drawn. It uses the expressions "owner or occupier," "such landowner," "occupier," "lands," "the land," "the ground." It omits the protection given by sect. 53 of the English Act of 1835, and where the condition is satisfied deprives the justice of all discretion; he must make the order. It contains two different powers: one as to digging for, raising, and carrying away road materials; the other as to drains to carry off water in or through any land, which, from the nature of waterflow, might not depend on the accidents of individual occupation. I am not aware that any question has ever arisen on this latter subject. The matter is usually treated as trivial, and not the subject of compensation.

The right to dig, raise, and carry away necessarily implies a right of entry and passage: *quando lex alicui aliquid concedit cencedere videtur id sine quo res ipsa esse non potest.* The mode of exercising the right (including passage) is left to the grantee acting reasonably, subject to compensation. He is not confined to an existing passage: *Boyfield* v. *Porter* (1). Hence the justice cannot prescribe the passage, though it has been held in *Doyne's Case* (2) that he can define the place of entry. *Boyfield* v. *Porter* (1) was not there cited. But for the Irish decision, it might be plausibly argued that the final provision in sect. 162 did not contemplate any special place of entry, and only meant that the statutory powers, failing consent, should not be exercised without a justice's order. The definition of the point of entry might interfere with the surveyor's freedom in selecting the line of passage.

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(1) 13 East 200.

Had the question been designed to give a right of creating a wholly new passage, as to which the justices would have no discretion, through adjoining lands, for the convenience of the surveyor or contractor, in substitution for an existing passage, or where no passage existed before, such right involving the destruction of fences, erection of gates, &c., the drafting would have been different. The right to carry away is connected with raising by the copula "and," and the section contemplates apparently the land whence the materials are taken, like sect. 52 of the Act 26 Geo. III, c. 14. Quarries and their exits are assumed to be in the same occupation. "The land" through which the passage is made is the same land as that of which "the surface" is broken. A quarry may be extended laterally, and surface may be broken for that purpose.

The mention of "occupiers" (in the plural) in the final clause is explained by that clause comprising two different classes of occupiers, in relation to road materials and to drains.

Section 12, sub-sect. 2, of the Local Government Act was strongly pressed as showing that persons outside the place where the material was taken were included. The provision was taken from sect. 51 of the Act of 1835 (relating to waste lands), without regard to the context. I am not aware that the provision has ever been put in force. In a valuable salmon or trout river it might have serious results. Whatever be its construction, as to which it would be unadvisable to express any concluded opinion, I do not think it can alter the interpretation of sect. 162, which it purports to apply to what is assumed to be a new subject-matter. As already observed, in sect. 53 of the Act of 1835 (relating to road materials in enclosed lands), and in the form of licence No. 10, the lands there dealt with would appear to be looked on as in the same occupation.

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(1) 13 East 200.

(2) 48 I. L. T. R. 237.

If sect. 162 is to be strictly construed, as FitzGerald J. held, there is nothing in it clearly authorizing such an interference with proprietary right as is now contended for. The form of order in Vanston's Grand Jury Laws shows how the section has up to this been interpreted. Our roads have been maintained satisfactorily on that view of the law, and the power of purchase given by sect. 12, sub-sect. 1, of the Local Government Act would enable special difficulties to be met.

KENNY J.:—

I concur. The contention in this case goes far beyond that in either *Coyle's Case* (1) or *Doyne's Case* (2). I was a party to the decision in the former case in which it was held that the route to the quarry through the lands in which the quarry was situate could not be prescribed. In *Doyne's Case* (2) the Court went very far in holding that the point of entrance to the lands from the road could be prescribed. But no case has ever gone the length of even suggesting that on the construction of this section it was open to the justices to prescribe a route to the quarry through the lands of the adjoining occupiers. Although it may be a matter of regret that the statute which gave the right to remove materials from the quarry did not also make provision for the method and route of such removal when other lands intervened between the quarry and the road, I am clearly of opinion that the section has not conferred jurisdiction to make such an order as has been made by the justices.

A. E. C.

(1) [1898] 2 I. R. I. (2) 48 I. L. T. R. 237.

The Birr Urban District Council appealed (1).

Appeal.
1916.

Rex (Horey) *v.* Justices of King's Co.

Denning K.C. and *Price* for the appellants:—

The object of sect. 162 of the Grand Jury Act is to enable the road authority to get materials for the repair of the roads; there is nothing showing that the title to the lands to be entered is material, or that they must all be in the occupation of the same person. The words at the beginning of the section authorize the surveyor or contractor to carry away the materials out of "any lands"; the right is not confined to the lands of the owner of the quarry. The proviso at the end of the section dealing with the order to enter refers to "occupiers," using the plural. The order cannot be confined to the mere area of the quarry. If the quarry was at the end, furthest from the road, of a field in the occupation of *A.*, it could not be suggested that there would not be power to make an order to enter that field and carry away from it the materials raised from the quarry. What difference can it make that the intervening portion of land is in the occupation of some other person? The right is to dig and carry away; the carrying away must be in respect of some area other than that in which the digging takes place.

Great inconvenience would result if an order of this kind could not be made. The work now done in the repairing of roads is much greater than formerly, and the quarries immediately adjoining roads are being worked out. If the contention of the respondent is to prevail, the owner of a quarry would be able to defeat the rights of the road authority by making a demise of a small strip of land between the quarry and the road.

[They referred to: *Rex* (*Coyle*) v. *Justices of Monaghan* (2); *Rex* (*Doyne*) v. *Justices of Carlow* (3); *Boyfield* v. *Porter* (4); *Ramsden* v. *Yeates* (5); 36 Geo. 3, c. 55 (Ir.).]

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(1) In the Court of Appeal, before Sir Ignatius J. O'Brien L.C., and Ronan and Molony L.JJ.

(2) [1908] 2 I. R. 1.

(3) 48 I. L. T. R. 237. (Aff. C. A. 21st Jan., 1915.)

(4) 13 East 200.

(5) 6 Q. B. D. 583.

Carrigan K.C. (with him *William Shannon*) for Horey, the respondent:—

The order which the justices are authorized to grant is to enter a person's lands for the purpose of digging for, raising, and carrying away road materials; the digging, raising, and carrying away represent one joint operation to be carried out on the lands of the same person. The order here must be treated as two orders, one to enter on the lands of Mrs. Ferns, and the other to enter on the lands of Horey. But an order to enter on lands can only be granted where it is proved to the satisfaction of the justices that the materials cannot be conveniently procured elsewhere, and this must appear on the face of the order. Such a statement would be meaningless in the order to enter on Horey's lands, from which it is not intended that any materials should be procured.

Price in reply.

May 21.

SIR IGNATIUS J. O'BRIEN L.C.:—

In this case, the decision which we feel constrained to give is one which I should have been very glad to avoid, because I appreciate the force of the argument addressed to us on the question of convenience. But although I have always considered that in construing an Act of Parliament one is entitled to have regard to its consequences, I have never gone beyond this, that if there are two possible constructions, the one which appears to be the least inconvenient, having regard to ordinary conditions of life, is to be preferred; but if there be only one possible construction, effect must be given to it. I feel certain that the result of holding that the justices have no power to make an order of the kind made in this case, will in countless other cases artificially force up the cost of road materials and the expense of making roads, and have a result never contemplated by the statute. At the same time I am compelled to construe the section in the only manner in which it can be construed.

The section (sect. 162 of the Grand Jury Act, 1836, as adapted by the schedule to the Local Government (Adaptation of Irish Enactments) Order, 1899) authorizes an order to enter on lands for digging and carrying away out of lands gravel and other road materials. A roving permission cannot be given to the county surveyor or road authority to wander over lands generally. The order is in its essence an order against an individual who must be named in the order, and the order must authorize the digging on some part of that individual's land.

Our Courts have held that the order must show jurisdiction on its face by setting out that the justices are satisfied that the gravel, etc., cannot be conveniently procured elsewhere, that is to say elsewhere than on the lands where the digging is to take place and which are in the possession of a particular person. This is the obvious prima facie construction of the section.

I have referred to the "order," but in the present case in reality two orders have been made, although in form only one, and necessarily so; for if the jurisdiction contended for exists at all, it must be to make two separate orders—one against *A. B.*, the owner of the land on which the quarry is situated, and another against *C. D.*, the person over whose lands the right of passage only is to be given. I make no point, however, as to the form of order. Whether two separate orders are made, one against *A. B.*, and the other against *C. D.*, or whether both are combined in one order, I am of opinion that the order is bad as regards *C. D.* As regards him, the statement that the materials cannot be conveniently procured elsewhere would be nonsense, yet without such a statement the order would be bad.

When the justices make an order for the digging and carrying away of the road materials, it follows that there must be a lawful authority in the county surveyor or contractor to take the materials over the lands of the person against whom the hostile order is made by what would be the most reasonable passage; but I cannot construe the section except in the limited sense that this passage must be through the land of the person in respect of whose land the order states that the materials cannot be conveniently obtained elsewhere, and cannot be through lands of an adjoining owner. This, I think, is the only possible construction of the section. It cannot be construed into a power to the justices, irrespective of the place where the materials are to be quarried, to give some kind of right—it is not easy to describe its nature—over the lands of another person.

The decision of the King's Bench Division must be affirmed.

RONAN L.J. :—

I agree that the order of the King's Bench should be affirmed, for the reasons stated by the Lord Chancellor and by Gibson and Kenny JJ.

MOLONY L.J. :—

Mr. Martin Horey is the owner and occupier of the lands of Clonoghill, which are held by him under a fee-farm grant from the Earl of Rosse, dated the 17th May, 1859. He has no quarry on his lands, but he has a neighbour, Mrs. Ferns, who does possess one.

In order to get to Mrs. Ferns's land it is convenient to pass over Horey's, and although the justices knew that Horey did not possess any quarry, they made an order against him under the 162nd section of the Grand Jury Act, 1836, the object being to grant a right of way across his lands to those of Mrs. Ferns.

The provisions of sect. 162 were relied upon as a justification for this order; but an examination of that section shows that an order cannot be made under it except where the applicant is going to dig, raise, and carry away gravel, stones, or other materials in or out of the lands in respect of which the order is made. In the present case it is clear that there was nothing to dig out of Horey's lands, and the only question in controversy was as to whether there was any power under the section to grant a right of way across his lands. I think it is clear that there is no such right.

Solicitor for the prosecutor: *John J. Kennedy.*

Solicitors for the Birr Urban District Council: *Richard F. Barry & Son.*

J. G. T.

In re PATRICK M'LOUGHLIN, a Bankrupt (1).

Appeal.
1915.
Dec. 2.

Bankruptcy — Examination of Witnesses — Unsatisfactory Answering — Committal—Irish Bankrupt and Insolvent Act, 1857 (20 *&* 21 *Vict. c.* 60), *s.* 385.

M., the bankrupt, and his wife were examined in the bankruptcy proceedings as to the ownership of certain leasehold premises. It appeared that in the year 1913, prior to the adjudication, M. and his wife, in proceedings in the Chancery Division in connexion with an agreement for the sale by M. of the premises, had made affidavits in which they stated that the premises in question, which had been previously assigned by M. to his wife in consideration of her paying a mortgage debt on them, were held by the wife upon trust for M. subject to the amount paid by her on foot of the mortgage. In an action subsequently brought by M. against his solicitor for negligence in connexion with the sale, it was alleged in the statement of claim that at the date of the assignment by M. to his wife it was verbally agreed that she should hold the premises in trust for M. subject to the amount paid by her on foot of the mortgage. On the examination in bankruptcy, M., in answer to questions put to him by counsel for the assignees in bankruptcy, swore that the premises were his wife's property. He at first denied that he had sworn the affidavit in the proceedings in the Chancery Division, but when it was produced he admitted his signature to it, but said that he had never read it. His wife when examined swore that the premises were hers. When examined as to the affidavit made by her, she said that she was lying sick in bed when she signed it, and that nothing was read to her but a few lines. The judge in bankruptcy made an order committing the bankrupt and his wife for unsatisfactory answering.

Held, by the Court of Appeal (O'Brien L.C. and Molony L.J., Ronan L.J. dissenting), that the answering of the bankrupt and his wife was not unsatisfactory within the meaning of s. 385 of the Irish Bankrupt and Insolvent Act, 1857, and that the order of committal should be discharged.

Held, by Ronan L.J., that the evidence of the bankrupt and his wife as a whole was characterized by such fencing and shuffling that the judge was entitled to consider it unsatisfactory, and was justified in making the order of committal.

What amounts to unsatisfactory answering within the meaning of s. 385 of the Irish Bankrupt and Insolvent Act, 1857, considered.

Appeal from an order of Boyd J., committing to prison the bankrupt, Patrick M'Loughlin, and his wife, Ellen M'Loughlin, for unsatisfactory answering.

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(1) Before O'Brien L.C., and Ronan and Molony L.JJ.

On the 6th April, 1909, Patrick M'Loughlin had executed to his wife an assignment of certain premises held by him under a lease for ninety-nine years from the 1st November, 1906. In the year 1913 the premises were put up for sale by Patrick M'Loughlin, and sold to a Miss Magrath. When the abstract of title was furnished, the purchaser's solicitor objected to the title. The vendor's solicitor replied that the vendor's wife would join in the conveyance. The purchaser refused to complete, and issued a summons under the Vendor and Purchaser Act praying that it might be declared that the objections of the purchaser to the title had not been sufficiently answered, and that a good title had not been shown; and claiming a return of the deposit paid by the purchaser. For the purpose of those proceedings an affidavit was made by Patrick M'Loughlin in which, after referring to the lease dated the 24th September, 1907, by which the premises in question were demised to him for the term of ninety-nine years from the 1st November, 1906, he stated:—"Before the said lease was executed, I had obtained a letter of lease. Subsequently to my obtaining the said letter of lease I executed a mortgage to one Patrick Forde for the sum of £150, and upon the original of said mortgage, bearing date the 11th December, 1906, marked 'B,' I have endorsed my name before swearing this affidavit."

"2. On the day of I was married to my present wife, Ellen M'Loughlin. Shortly after my marriage the said Patrick Forde required payment of the money due him on said mortgage deed. At this time my wife had money deposited in her name in the Northern Bank, and it was agreed between myself and my wife that in consideration of my wife paying off the sum then due the said Patrick Forde, I should execute to her an assignment of the premises. Accordingly, on the 6th day of April, 1909, an assignment was made between Patrick Forde of the first part, me, this deponent, of the second part, and Ellen M'Loughlin of the third part. At the time this assignment was made there was a verbal arrangement between myself and my wife, and it was agreed between us that she, the said Ellen M'Loughlin, should stand possessed of the said premises, subject to the amount paid by her to the said Patrick Forde, in trust for me, this deponent, absolutely. There was no instrument creating

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1915.

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this trust. Before I offered the premises for sale I had my wife's authority to do so, and she is perfectly willing to join in any deed that may be required to complete the title. I say that I have spent considerably over £500 in erecting buildings on the said plot demised by the said lease. My wife never took any part in contributing to this expenditure, and no change was ever made in the landlord's books, and I am still the tenant of the said premises, and in occupation of same, and have paid my rent every year in my own name to the landlord's agent, and I beg to refer to the rent receipts up to the last gale day, which show that I am the tenant of the said premises."

Mrs. Ellen M'Loughlin also made an affidavit, in which she stated as follows:—" 1. I am the wife of Patrick M'Loughlin, the vendor herein. I do not claim to be entitled to the beneficial interest in the premises, the subject of this action. 2. I beg to refer to the original assignment, dated 6th April, 1909, and made between Patrick Forde of the first part, Patrick M'Loughlin of the second part, and me, this deponent, of the third part. At the time this assignment was executed, it was arranged between my husband, the said Patrick M'Loughlin, and me, this deponent, that I should stand possessed of the said premises in trust for the said Patrick M'Loughlin absolutely, subject to the amount paid by me on foot of the mortgage to Patrick Forde. 3. There was no instrument in writing creating this trust. Before my husband put up the said premises for sale, I gave him and his solicitor, Mr. James A. Kieran, authority to do so, and same has my consent, and I am prepared to join in any deed of conveyance to complete the title to the said premises. 4. Since the date of said assignment my husband has continued to pay the rent of said premises in his own name, and in addition has carried on business in said premises, and has traded in his own name, and expended considerable sums of money in permanent improvements."

The summons was heard before Barton J., who granted the purchaser's application. The decision was affirmed by the Court of Appeal (1).

An action was subsequently brought by Patrick M'Loughlin

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(1) See *In re Patrick M'Loughlin and Maria Magrath's Contract*, 48 I. L. T. R. 87

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against his solicitor for alleged negligence in connexion with the sale. Paragraph 5 of the statement of claim set out as follows:—"At the date of the said indenture of assignment in the last paragraph mentioned [the assignment of the 6th April, 1909] it was verbally agreed between the plaintiff and the said Ellen M'Loughlin that the said Ellen M'Loughlin should stand possessed of the said premises, subject to the said sum of £150, being the amount paid by her to the said Patrick Forde as aforesaid, in trust for the plaintiff absolutely."

The jury found that there was no negligence on the part of the solicitor, and he obtained judgment for his costs of the action, and on the 5th July, 1915, Patrick M'Loughlin was adjudicated a bankrupt in respect of the amount due for these costs.

On the 19th November, 1915, the bankrupt and his wife were examined before Boyd J., sitting as judge in bankruptcy, by Wylie K.C., for the assignees. The following transcript of the shorthand writer's notes of the bankrupt's evidence was signed by him:—

"The bankrupt, being sworn and examined before the Court . . . upon his oath, by Mr. Wylie K.C., instructed by Messrs. Horan & Devine, solicitors for the assignees, saith, in answer to questions, as follows:—

"1. Did you own this property in Ballinamore, or did your wife? Which property? 2. The house in Ballinamore, Sir, who owned it? I owned one house, a drapery establishment, there. 3. Do you own the property you are living in? It is my wife's property. 4. Is it her property altogether? Yes. 5. Altogether? Yes, certainly. 6. Absolutely? Certainly. 7. Do you remember swearing an affidavit on the 29th day of September, 1913, with this statement in it? [Document handed in.] Look at paragraph 2. [Counsel reads paragraph beginning, 'I was married to my wife, Ellen M'Loughlin.'] Did you swear that affidavit, Sir? I did not. 8. You did not? Never. The affidavit, my Lord, never was read for me. 9. Mr. Justice Boyd—You had better be careful. Witness—The affidavit, my Lord, never was read for me. (The original affidavit was brought from Mr. Justice Barton's Court and shown to witness.) 10. Mr. Justice Boyd—Do you see your signature to that document? I do, my Lord. 11. Is it your signature? It is, my Lord. 12. Why did you deny you swore it? What I say is this, my Lord, and I say it yet, and I cannot go back of the truth, this document never was read to me. 13. Mr. Wylie K.C.—That is what you say now? Yes, that is what I said all the time. 14. Do you remember starting an action against Mr. Kiernan for negligence in the sale of the house? I do, and it was right. 15. Do you know what the action was brought for? For negligence. 16. Listen to your statement of claim. (Counsel reads statement of claim, paragraph 5.) That was the very cause of action you brought against Mr. Kiernan? Not at all. 17. How do you explain that, Sir? I do not know where you got that. 18. How much surprised you are that I got it. It was the statement of claim in your own action. I do not know where you got that at all. 19. How do you explain that, Sir? That is some of Mr. Kiernan's trickery and dodging. 20. There is the statement filed by your own solicitors. Were not Messrs. Lynch & Deering your solicitors in the action against Mr. Kiernan? Yes. 21. Mr. Wylie K.C.—I ask your Lordship to commit this man for unsatisfactory answering."

"Ellen M'Loughlin being sworn and examined before the Court . . . by Mr. Wylie K.C., instructed by Messrs. Horan & Devine, solicitors for the assignees, saith in answer to questions as follows:—

"1. Who owns the house you are living in in Ballinamore now? Myself. 2. Did you ever swear an affidavit saying that you held it in trust for your husband absolutely? No. I didn't know the affidavit I swore was this. I was lying sick in bed when the attorney came in and told me I had to sign the affidavit. It was to give the place over to Mrs. Magrath, my right and title to the place when she bought it over. And I was lying sick in bed. 3. Listen to this affidavit. I will. 4. Listen to this. I want justice now, what I never got before. 5. (Counsel reads affidavit.) Did you know that you were making an affidavit? No. He didn't read no paper for me. 6. Do you swear you didn't know that you were making an affidavit? No. Just give me time. I knew that I was asked to make an affidavit to give the place over to Mrs. Magrath right and honest. 7. Did you know you were making an affidavit? Wasn't I asked to make an affidavit to give the place to Mrs. Magrath? 8. Did you know you were making an affidavit? Now just give me time. There is no hurry. I want justice. 9. Did you know you were making an affidavit? I was asked to make an affidavit had I any objection to assigning and giving over the place now to Mrs. Magrath. 10. Did you know, yes or no, you were making an affidavit? Yes. I was asked to make an affidavit. 11. Did you know that you were swearing to the truth of what was in it? There was nothing read for me, only a few lines. I was lying sick in bed. 12. Did you know you were swearing to the truth of the affidavit? My Lord, I was asked to make an affidavit to the effect that had I any objection to give the place over to Mrs. Magrath. That was the affidavit I made. 13. Did you know you were swearing to the truth of this affidavit? Sure I might as well swear Dublin belonged to Mr. Kiernan, lying sick in my bed. 14. Mr. Wylie K.C.—I ask your Lordship to commit this witness also. Witness. I have more to say nor that. I must give my evidence now. I am starving, my Lord. I am starving, and I want fair play, which I never got. I paid the rent of this place before I married my husband at all. I gave him £200, and then I had money in bank that we called upon any time we wanted in business; and now I am starving, only kept by my friends and relations. I want to tell the truth, my Lord. I am out of a sick bed now. 15. (Affidavit made by witness, shown to witness by Registrar.) Is that your hand-writing? That is the affidavit when I was on my sick bed, when the attorney came up. 16. Mr. Justice Boyd. That is your signature? It is my signature. I might as well swear that the house was yours. I expect justice, which I never got."

"Mrs. Ellen M'Loughlin was again examined on oath before the Court, and said, in answer to questions, as follows:—

"1. Registrar. Have you read over the transcript of your evidence? It was read over to me. 2. And you signed it? Yes. 3. And this is your name and handwriting? Yes. 4. Is it taken down correctly—are there any corrections you wish to make? I paid the rent of the place before we were married. This was before the house was sold. 5. Mr. Wylie K.C. Do you want to correct the fact that you claim the house now as yours? Well, of course there is a mortgage on the house. 6. Do you claim the house as your property? Yes, the house is my property. 7. Mr. Justice Boyd—Are you willing to admit that what you stated in your affidavit is true? Well, we haven't got a chance—we have no lawyer here. 8. You swore before, and no commissioner could take the affidavit without the affidavit being read to you. Your solicitor prepared it for you, and it was read to you before the commissioner, and you signed it, whether true or false. Well, I signed an affidavit. The attorney only read a few lines to me. I was lying in bed, and I signed the affidavit. 9. Registrar—Is this a correct transcript of your evidence? Well, I have some matters there to alter, about money in the bank I said that I gave my husband. How is it I wouldn't have a claim on the property and paid first £200 to my husband? For one minute. I only want to get justice. First of all I paid rent for my husband. He asked me for money to pay the rent of this house before we were married. Then that cost £200, and next I sent away my money to America, after putting £100 in the bank at his disposal. 10. Mr. Justice Boyd—You swore in your affidavit you were trustee for your husband. No, my Lord; there never was a word mentioned. I should have something for my money, my Lord. 11. I asked you the question, Are you willing to admit that what you have stated in your affidavit is true? I admit that I have no agreement to represent my husband. I paid the money, and my husband assigned it to me, and that is what I have done with my money, and that is the truth. 12. You have sworn in the affidavit one thing, and now when you come forward and try to retrieve the credit of your husband you have sworn another. No. I don't want to take any money or cheat anyone. I want to see all my debts paid. 13. Registrar—That is a correct transcript of what you said here in Court? Yes."

"Patrick M'Loughlin was again examined on oath and said in answer to questions as follows:—14. Registrar—Have you read over the transcript of your evidence? It was read for me. 15. This is your name and handwriting? Yes. 16. Are there any corrections you wish to make? There is none whatever. 17. Is it a correct transcript of your evidence? Yes. I assigned the place to my wife, and I have no claim on it. I am not a

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lawyer evidently. I am no lawyer. I have no lawyer to defend me. 18. Mr. Justice Boyd—You have sworn in the affidavit in the Court of Chancery, when you thought that it was to your advantage, that the property belonged to you and not to your wife, and now you state it belongs to your wife and not to you? The whole documents, there was none of them read for me. 18. And that statement was the whole basis of your action against Mr. Kiernan? It was not. That was wrong, wherever you got that.

Boyd J. made an order committing to prison the bankrupt and his wife for unsatisfactory answering. The present appeal was taken from this order.

Serjeant Sullivan K.C. and *Martin C. Maguire*, for the appellants :—

The order of committal should be discharged. The object of the examination of witnesses in bankruptcy is merely to ascertain the property of the bankrupt with a view to enable the assignees subsequently to take the necessary steps to make it available for the creditors. The issue on such examination is not whether the claim of the assignees is good or bad, nor as to the actual truth or falsehood of the statements of the witness. The power of committal is to be exercised, not for the purpose of punishing a witness, but with a view of obtaining answers which will enable the assignees to recover and realize property of the bankrupt. The answering here was not unsatisfactory within the meaning of sect. 385 of the Bankruptcy Act of 1857; "unsatisfactory" within that section does not mean untrue. [The following cases were referred to :—*In re Conway* (1); *In re Garvine* (2); *Ex parte Lee* (3).]

Wylie K.C. for the respondents, the assignees in bankruptcy :—

The examination of the witness must be taken as a whole, and so taken the answering both of the bankrupt and of his wife was unsatisfactory. They shuffled and fenced with every question throughout. [He referred to *Ex parte Nowlan* (4); *Taylor's Case* (5).]

(1) 46 I. L. T. R. 243.
(2) 4 New Ir. Jur. Rep. 18.
(3) 2 Mont. & Ay. 15.
(4) 6 T. R. 118.
(5) 8 Ves. 328.

O'Brien L.C. :—

As this is a case in which the custody of persons is involved, it is not right to postpone our decision.

I do not shut my eyes to the importance of the case; indeed, in many respects to which I shall have to refer, I consider it a very important case, because it opens up the consideration of the procedure for the examination of witnesses under the bankruptcy code. Before referring to the particular facts of the case, I wish to refer to the sections of this code dealing with the examination of the bankrupt and witnesses, and also to some other sections which I think must be considered.

Under the bankruptcy statutes as they now exist, a statutory assignment of the property of the bankrupt takes place on adjudication. Sect. 267 of the Irish Bankrupt and Insolvent Act, 1857, provides that "when any person shall be adjudged a bankrupt, all the personal estate and effects of such bankrupt, present and future, wheresoever the same may be, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before such bankrupt shall have obtained his certificate in pursuance of the adjudication made in that behalf, and all debts due or to be due to him, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt." The real estate of the bankrupt is dealt with by sect. 268, which provides that "when any person shall be adjudged a bankrupt, all lands, tenements, and hereditaments (except copy or customary hold), wheresoever the same may be situate, to which any such bankrupt is entitled, and all interest therein to which such bankrupt is entitled, and of which he might have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of such bankrupt." These two sections operate as a statutory conveyance to the assignees of the real and personal property of the bankrupt, but of course do not operate to convey to the assignees any property which is not the property of the bankrupt.

In order that the assignees may obtain possession of, and acquire title to, property which is not by that statutory conveyance vested in them, or to a chattel which is not in the custody of the assignees at the date of the adjudication, but which they are entitled to claim on the ground of fraud, or trust, or other special circumstances, they must take certain independent proceedings to have such property vested in them, and they may, generally speaking, take such proceedings either in the Court of Bankruptcy itself, or in any other Court of competent jurisdiction.

Some difficulty unquestionably has arisen owing to the process of growth of the bankruptcy statutes. In England the whole of this matter is dealt with by a code which is, I think, in many respects more in harmony with modern views than our code. But we must deal with the statutes as they stand, and accordingly we find that the sections which enable witnesses to be examined have been extended to cases which in former days did not perhaps arise, in consequence of the larger equitable jurisdiction which the Bankruptcy Court now possesses as contrasted with the limited jurisdiction which was vested in the commissioners.

So far as the bankrupt himself is concerned, the examination in early days took the form of a statutory examination before commissioners. There was a first, a second, and even a third examination, and at these examinations the bankrupt was bound to disclose his property. For the purpose of obtaining such disclosure the commissioner was entitled to put questions to the bankrupt, and according to the sufficiency or insufficiency of the answer depended not only the liberty, but even, as a result, the life of the bankrupt, because non-disclosure or concealment was at one period of the law a felony punishable capitally.

As time went on it became obvious that the examination merely of the bankrupt was not sufficient, and whatever may have been the position of the examination sections in the earlier Bankruptcy Acts, they have been used, and rightly used, for the purpose of putting questions to the bankrupt, his wife, and other persons, with the object of obtaining information which would enable the assignees to trace the property of the bankrupt, and by taking the proper proceedings, either in the Court of Bankruptcy or other court of competent jurisdiction, to make it available for the creditors.

Section 306 of our Bankruptcy Act of 1857 empowers the Court to examine the bankrupt upon oath, either by word of mouth, or by interrogatories in writing, and to reduce his answers into writing, and provides that when the examination is reduced into writing the bankrupt shall sign it. In modern times this is not confined to the prescribed first and second examinations; a public examination may be held at any time.

By sect. 307 the Court was given power to examine the wife of the bankrupt for the purpose of the discovery of the estate of the bankrupt, concealed, kept, or disposed of by her, or by any other person, and she was likewise required to sign her examination when reduced into writing.

Jurisdiction to examine witnesses generally was given by sect. 308, which enables the Court to summon before it any person known or suspected to have any of the estate of the bankrupt in his possession, or supposed to be indebted to the bankrupt, or any person the Court may believe capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, and to require him to produce books, etc.; and by sect. 310 the Court may examine upon oath such person, or any person present at any sitting of the Court, the examination to be reduced into writing and signed by such person.

Section 308 must be carefully considered. It is possible that as the law stood at the date of the passing of this Act, it was not a section which dealt with the wife of the bankrupt, but most likely, as she is now in the position of a feme sole, she may be subject to that section, and I am willing, for the purpose of my judgment, to assume this, though there may be something to be said for a contrary view.

The whole jurisdiction is to deal with persons who are suspected of fraudulently concealing the property of the bankrupt, or persons capable of giving information concerning the estate of the bankrupt.

Refinements upon the meaning of these sections have been, I think, rightly discouraged, because it is not always possible to avoid putting questions which may possibly affect the witness's own right to property. But in dealing with a witness who claims the property, and whose claim may be reasonable, the Court ought to be careful not to permit the cross-examination of the witnesses to extend too far. In putting the questions the ultimate object appears to me to be to ascertain such matters as may be useful in future proceedings to recover the property. But I am absolutely clear that it does not justify the Court, where it has adopted one of two possible theories as to the person who is the owner of the property, in utilizing the power of committal because the witness will not answer a question in such a way as will establish the title of the assignees, as against the title of the witness.

I should draw attention to this, that no doubt under normal circumstances the position of a witness is materially different from the position of the bankrupt when examined. One of the distinctions, the result of authority, is that a mere witness may refuse to answer a question on the ground that his answer would tend to incriminate him, while the bankrupt is not, by judicial decision, entitled to this protection; and the one thing which has given me trouble is whether the position of the bankrupt on this examination may not be different from the position of a mere witness.

The present case is a very singular one. Certain house property in the town of Ballinamore was put up for sale, in the year 1913, by Patrick M'Loughlin, the bankrupt here, and sold to a Mrs. M'Grath. An abstract of title was furnished, which showed that on the 6th April, 1909, M'Loughlin had executed an assignment of the premises to his wife, she having paid off, out of her own money, a mortgage on the premises to one Patrick Forde for £150. The purchaser's solicitor objected to the title. The vendor's solicitor replied that the vendor's wife would join in the conveyance to the purchaser. The purchaser refused to complete, and issued a summons under the Vendor and Purchaser Act, 1874, asking that it might be declared that a good title had not been shown. The summons was heard by Barton J., who granted the application, and his decision was affirmed by this Court.

M'Loughlin, in an affidavit which he made in those proceedings, stated that, shortly after deponent's marriage, Patrick Forde required payment of the money due to him on the mortgage. He goes on to say: "At that time my wife had money deposited in her name in the Northern Bank, and it was agreed between myself and my wife that, in consideration of my wife paying off the sum then due the said Patrick Forde, I should execute to her an assignment of the premises. Accordingly, on the 6th day of April, 1909, an assignment was made between Patrick Forde of the first part, me, this deponent, of the second part, and Ellen M'Loughlin of the third part. At the time this assignment was made there was a verbal arrangement between myself and my wife, and it was agreed between us that she, the said Ellen M'Loughlin, should stand possessed of the said premises, subject to the amount paid by her to the said Patrick Forde, in trust for me, this deponent, absolutely."

His wife also made an affidavit, in which she states:—"I do not claim to be entitled to the beneficial interest in the premises the subject of this action." She refers to the assignment of the 6th April, 1909, and says:—"At the time this assignment was executed it was arranged between my husband, the said Patrick M'Loughlin, and me, this deponent, that I should stand possessed of the said premises in trust for the said Patrick M'Loughlin absolutely, subject to the amount paid by me on foot of the mortgage to Patrick Forde."

Therefore the evidence given by the husband and wife on that occasion was to the effect that the wife was, at most, entitled only to an encumbrance on the property; but, beyond all doubt, she had some estate in her.

Subsequently, an action was brought by M'Loughlin against his solicitor, Mr. Kiernan, for alleged negligence in connexion with the sale of the premises. The defence was, in substance, that there was no negligence, because the defendant in everything he did acted on the express instructions of the plaintiff. The jury found that there was no negligence on the part of the solicitor, and he obtained judgment for his costs. It is in respect of these costs that M'Loughlin has been adjudicated bankrupt.

It has been sought to utilize a paragraph in the statement of claim in that action, paragraph 5, which is as follows:— "At the date of the said assignment in the last paragraph hereof mentioned [the assignment of the 6th April, 1909] it was verbally agreed between the plaintiff and the said Ellen M'Loughlin that the said Ellen M'Loughlin should stand possessed of the said premises, subject to the said sum of £150, being the amount paid by her to the said Patrick Forde as aforesaid, in trust for the plaintiff absolutely." That is not considered in law as the bankrupt's own statement—it is the statement of his solicitor—but it was perfectly proper to cross-examine the bankrupt in reference to the proceedings in that action.

In early days, as I have mentioned, these examinations took place before a commissioner, and undoubtedly as regards the bankrupt, and I think also as regards the witnesses, the questions were written out by the commissioner, and the proceedings were conducted on the lines of inquests in early days, and modern courts martial, where every question and answer is in writing. I think that when the Court is exercising its discretion as to putting in force this tremendous power of depriving a man of his liberty, the protection which the Legislature places round this examination ought not to be forgotten, and that while the examination should be as searching as possible, it should be conducted in a fair, calm, and impartial manner. Speaking for myself, I must deprecate the introduction into this procedure, so fateful in its consequences not only to the bankrupt but to witnesses, of a method which converts what the statute regarded as a searching examination, into a cross-examination conducted under circumstances in which question and answer are taken down by a shorthand writer, so that when the matter is afterwards examined, a very different condition of affairs may appear to the mind of a person reading the document, from what would appear if a different method of putting the questions had been adopted.

The principle laid down in *Ex parte Lee* (1) is supposed still to regulate these proceedings. Alderson B. there says:—"Many of the answers are certainly of such a nature as to appear at first unsatisfactory, but the commissioners did not sufficiently press these points; if they had pressed them, the bankrupt might have placed them in a more satisfactory view. The commissioners should have pointed out to the bankrupt the particulars wherein they were

(1) 2 Mont. & Ay. 15.

dissatisfied, then, perhaps, he might have reconciled what they conceived to be contradictions, and have supplied what to them appeared omissions. At present these examinations have more the appearance of cross-examinations by adverse counsel, than of what should be the examination of commissioners." I am aware of nothing which abrogates that principle, which, I think, ought to govern the modern practice under which counsel are allowed to put questions. In saying this I am not to be taken as at all condemning Mr. Wylie, who conducted his cross-examination in accordance with what has been the practice in recent years. I only wish to deprecate carrying that practice too far. It is not to be forgotten that the witness is without legal assistance.

The examination in this case was conducted obviously for the purpose of satisfying the Court that there existed evidence on which it would be determined either that the bankrupt's wife did not own the place at all, or had only an incumbrance on it, and held it upon trust for her husband. It was quite legitimate for the Court and counsel to ask this woman did she adhere to the view expressed in her affidavit made in the former proceedings, and to test by other questions the accuracy of her answers.

It appears that there were two examinations in this case: first, a separate examination of the husband, and, secondly, an examination in which the husband's attention was drawn to his previous answers, and the wife was also examined. The wife completed her sworn statement, and the husband completed his sworn statement, and it seems to me to be perfectly immaterial at what stage of the proceedings Mr. Justice Boyd was asked to commit the husband, and was asked to commit the wife. Before going into the evidence in detail, I am entitled to ask what was the object of the examination; and I am perfectly clear that the object was to compel the husband and wife to give certain answers which would be favourable to the title of the assignees in future proceedings. Now, while the Court can summon any number of witnesses, and examine them in the most searching way, and allow counsel to cross-examine them out of any former depositions they may have made, yet beyond all doubt the Court is not entitled there and then to order that the witness shall give up to the assignees property the legal title to which is vested in him, and the assignees' title disputed. Subsequent proceedings must be taken for that purpose. There is another matter on which I hold a very strong opinion. It is not justifiable to hold over a witness, whose apparent property the assignees seek to acquire, the threat of putting in force the powers conferred by the statute in order to compel answers which might be favourable to the case of the assignees as against the case of the witness. The principal cases in which the law has been considered on this point is where the property was originally vested in the bankrupt, and is prima facie his property, and he proceeds to deal with it in a manner contrary to what the law conceives to be just. But, while it is impossible to lay down any fixed rule, the Court, in my judgment, must, when dealing with a case of property which prima facie it is not unreasonable to suppose may be the property of some other person, be careful to see that the statutory jurisdiction is not exercised in such a way as to amount to a threat to the witness, "You have perjured yourself. If you don't answer in a particular way, you will go to gaol."

I now proceed to take up the examination of the wife. The first question put, is, "Who owns the house you are living in in Ballinamore?" Answer—"Myself." If that stood alone, the Court could scarcely commit. "Did you ever swear an affidavit saying that you held it in trust for your husband absolutely? No. I did not know the affidavit I swore was this. I was lying sick in bed when the attorney came in and told me I had to sign the affidavit. It was to give the place over to Mrs. Magrath, my right and title to the place when she bought it over. And I was lying sick in bed. Listen to this affidavit—I will. Listen to this—I want justice now, what I never got before." Then counsel reads the affidavit which is the one I have already referred to as made by her on the occasion of the vendor and purchaser proceedings, the object of the examination being to show that she had then sworn that she had no beneficial interest in the premises.

The examination proceeds:—"Did you know you were making an affidavit? No. He didn't read no paper for me. Do you swear you didn't know that you were making an affidavit? No. Just give me time. I know that I was asked to

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make an affidavit to give the place over to Mrs. Magrath right and honest. Did you know you were making an affidavit? Wasn't I asked to give the place to Mrs. Magrath? Did you know you were making an affidavit? Now, just give me time. There is no hurry. I want justice. Did you know you were making an affidavit? I was asked to make an affidavit had I any objection to assigning and giving over the place to Mrs. Magrath. Did you know, yes or no, you were making an affidavit? Yes. I was asked to make an affidavit. Did you know that you were swearing to the truth of what was in it? There was nothing read for me only a few lines. I was lying sick in bed. Did you know you were swearing to the truth of the affidavit? My Lord, I was asked to make an affidavit to the effect that had I any objection to give the place over to Mrs. Magrath. That was the affidavit I made. Did you know that you were swearing to the truth of the affidavit? Sure I might as well swear that Dublin belonged to Mr. Kiernan, lying sick in bed." Mr. Wiley then asks the judge to commit the witness. This application was not acceded to at that time.

What does all this really amount to? The witness says she did make the affidavit. She says that she didn't know what she was doing. I am not at all sure that that is not substantially true, because I cannot conceive that a woman in her class of life would have knowingly made an affidavit that she had no interest in the premises when she had paid £150 for them. I conceive that the object of this examination was to get this woman to admit that one of several statements which she had made before represented the true state of facts.

The witness then proceeds to say:—"I have more to say nor that. I must give my evidence now. I am starving, my Lord. I am starving, and I want fair play, which I never got. I paid the rent of this place before I married my husband at all. I gave him £200, and then I had money in bank that we called upon any time we wanted in business; and now I am starving, only kept by my friends and relations. I want to tell the truth, my Lord; I am out of a sick bed now." The affidavit was then produced, and she admitted that she swore it. It speaks for itself.

I now take up her subsequent examination. In answer to the registrar she states that the transcript of her evidence had been read over to her, and had been signed by her. Asked if she has any corrections to make, she says, "I paid the rent of the place before we were married. This was before the house was sold." Mr. Wylie then asks her, "Do you want to correct the fact that you claim the house as yours?" She answers, "Well, of course there is a mortgage on the house." "Do you claim the house as your property?" I suppose if she had said that she did not, her answer would have been considered satisfactory. Her answer, however, is, "Yes, the house is my property." Mr. Justice Boyd then asks, "Are you willing to admit that what you stated in your affidavit is true?" Answer—"Well, we haven't got a chance; we haven't got a lawyer here." Mr. Justice Boyd then says. "You swore before, and no commissioner could take the affidavit without the affidavit being read to you. Your solicitor prepared it for you, and it was read to you before the commissioner, and you signed it, whether true or false." She answers, "Well, I signed an affidavit. The attorney only read a few lines to me. I was lying in bed, and I signed the affidavit." Later on Mr. Justice Boyd says "You swore in your affidavit you were trustee for your husband." She answered, "No, my Lord, there never was a word mentioned." That answer is untrue. She had sworn that she was a trustee. But taking the position she was in, that the main matter in her contemplation was that she had an interest in the house, I do not think that that amounts to unsatisfactory answering. The examination proceeds, "I asked you the question, are you willing to admit that what you have stated in your affidavit is true? I admit that I have no agreement to represent my husband. I paid the money and my husband assigned it to me, and that is what I have done with my money, and that is the truth. You have sworn in your affidavit one thing, and now, when you come forward and try to retrieve the credit of your husband, you swear another? No. I don't want to take any money or cheat anyone."

She now insists that the house is her property, while she had sworn the contrary in the former proceedings; that is unsatisfactory in the sense that she will not admit the title of the assignees; but is that sufficient? She may have told the truth in her former statement and a lie in the later; or she may have told the truth in the later proceedings and a lie in the former; but I cannot hold that this amounts to unsatisfactory answering, justifying her committal. She had, undoubtedly, paid money for the house. She persists that it is hers. Whether that is true or false is immaterial. It is straining the jurisdiction of the Court, where the issue is between this woman and the assignees as to whether the house is her property or theirs, to commit her for unsatisfactory answering because she will not admit that it is the assignees'. Accordingly, I am of opinion that, so far as Mrs. M'Loughlin is concerned, the order of Mr. Justice Boyd must be discharged.

I do not dispute that, while the attention of the witness must be directed to the answers which are considered unsatisfactory, the committal is upon the whole examination.

I now come to the case of the bankrupt himself, which I confess has given me considerable difficulty, because it cannot be disposed of in the same way as the case of the wife.

The bankrupt was examined by Mr. Wylie. I read from the transcript of the bankrupt's examination, signed by him:—

"1. Did you own this property in Ballinamore? What property? 2. The house in Ballinamore, Sir, who owned it? I owned one house, a drapery establishment, there. 3. Do you own the property you are living in? It is my wife's property. 4. Is it her property altogether? Yes. 5. Altogether? Yes, certainly. 6. Absolutely? Certainly. 7. Do you remember swearing an affidavit on the 29th September, 1913, with this statement in it? (Document handed in.) Look at paragraph 2" —that containing the statement I have already read from the affidavit of the bankrupt, made in the proceedings before Mr. Justice Barton. Counsel having read this paragraph, the examination continues:—"Did you swear that affidavit, Sir? I did not. 8. You did not? Never. The affidavit, my Lord, never was read for me. 9. Mr. Justice Boyd—You had better be careful. Witness—The affidavit, my Lord, never was read for me. (The original affidavit was then brought from Mr. Justice Barton's Court and shown to witness.) 10. Mr. Justice Boyd—

Do you see your signature to that document? I do, my Lord. 11. It is your signature? It is, my Lord. 12. Why did you deny you swore it? What I say is this, my Lord, and I say it yet, and I cannot go back of the truth, this document never was read to me. 13. Mr. Wylie K.C.—That is what you say now? Yes, that is what I said all the time. 14. Do you remember starting an action against Mr. Kiernan for negligence in the sale of the house? I do, and it was right. 15. Do you know what the action was brought for? For negligence. 16. Listen to your statement of claim." Counsel then reads paragraph 5 of the statement of claim, to which I have already referred. It was quite legitimate to examine the witness as to this, although I do not think that matters set out in the statement of claim, which is the work of solicitor or counsel, can be ground for a committal for unsatisfactory answering. The examination proceeds:—"That was the very cause of action you brought against Mr. Kiernan? Not at all. 17. How do you explain that, Sir? I don't know where you got that. 18. How much surprised you are that I got it. It was the statement of claim in your own action. I don't know where you got that at all. 19. How do you explain that, Sir? That is some of Mr. Kiernan's trickery and dodging. 20. There is the statement filed by your own solicitor. Were not Messrs. Lynch & Deering your solicitors in the action against Mr. Kiernan? Yes." Mr. Wylie then asked the judge to commit the bankrupt for unsatisfactory answering.

There does not appear to me to be sufficient in this examination to justify a committal. The bankrupt, when confronted with the affidavit formerly sworn by him, still maintains that the property is his wife's. But I do not think that the Court is entitled to commit simply because he will not say that what he stated before was true, and what he states now is false.

He is brought up again for examination, after having signed a transcript of his former evidence, and, undoubtedly, his further examination is more favourable to Mr. Wylie's case. He is asked by the registrar are there any corrections he wishes to make, and he answers, "None whatever." He is asked is it a correct transcript of his evidence. His answer is, "Yes; I assigned the place to my wife, and I have no claim on it. I am not a lawyer, evidently. I am no lawyer. I have no lawyer to defend me." Mr. Justice Boyd says to the witness, "You have sworn in the affidavit in the Court of Chancery, when you thought it was to your advantage, that the property belonged to you and not to your wife, and now you state it belongs to your wife and not to you." The witness replies, "The whole documents, there was none of them read to me." "And that statement was the whole basis of your action against Mr. Kiernan?" "It was not. That was wrong, wherever you got that."

I am satisfied that what was operating in the mind of the judge was, that the bankrupt had, in his affidavit in the former proceedings, made a statement very advantageous in the case of the assignees, and that he will not admit this. No doubt the bankrupt, instead of answering the judge straightforwardly, proceeds to fence with the question; but if every witness who fenced with a question was to be committed to prison, we should have a singular state of affairs in courts of justice.

I think that the real reason for the commitment was, that neither the husband nor the wife would give up the claim to the property which the documents prima facie showed to exist in the wife. The answering was, no doubt, unsatisfactory to the assignees, in the sense that the bankrupt would not admit that the property was his. But this is not enough, and I am of opinion that on the whole facts there was no evidence to justify the judge in committing either the husband or the wife for unsatisfactory answering.

RONAN L.J.:—

If my opinion affected the decision of this case, I should have asked the Lord Chancellor to allow it to stand for judgment, that I might further consider the matter. As he and Lord Justice Molony have formed a clear view that the order should be reversed, and the liberty of the subject is involved, this would clearly be an improper course to take. Under the circumstances, I can only say that I am not at present satisfied that we should interfere with the exercise of the discretion of Boyd J. in the matter.

The committals here were made under sect. 385 of the Bankruptcy Act of 1857, which provides that if any person shall refuse to be sworn, or refuse to answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court, it shall be lawful for the Court by warrant to commit such person to prison.

I see nothing in the case relating to incriminating questions.

The Court of Bankruptcy is a branch of the High Court, presided over by a judge of the High Court, and we must presume that such judge did his duty, unless there is clear evidence to the contrary. I entirely agree with the Lord Chancellor that if a judge of the High Court ever forgot his duty so far as to say to a witness, "if you don't swear a particular thing, I shall send you to gaol," a committal based on this should be set aside. But I should require strong evidence to satisfy me that a judge of the High Court did so act. I can find no such evidence in this case.

The examination of these witnesses was carried on under the control of the judge. It was his duty to make a searching inquiry into the matters affecting the estate of the bankrupt. The question was whether this house was the property of the bankrupt or of his wife. The husband and wife were examined. Each had made an affidavit in the Chancery proceedings instituted before Mr. Justice Barton, and both affidavits made precisely the same case. I take the husband's affidavit. He says that, shortly after his marriage, payment had been required by a mortgagee, Patrick Forde, of the money due on the mortgage. That at that time his wife had money deposited in her name in the bank, and that "it was agreed between myself and my wife that in consideration of my wife paying off the sum then due to the said Patrick Forde, that I should execute to her an assignment of the premises. Accordingly, on the 6th day of April, 1909, an assignment was made between Patrick Forde of the first part, me, this deponent, of the second part, and Ellen M'Loughlin of the third part. At the time this assignment was made there was a verbal arrangement between myself and my wife, and it was agreed between us that she, the said Ellen M'Loughlin, should stand possessed of the said premises, subject to the amount paid by her to the said Patrick Forde, in trust for me, this deponent, absolutely."

The wife in her affidavit says:—"At the time this assignment was executed it was arranged between my husband, the said Patrick M'Loughlin, and me, this deponent, that I should stand possessed of the said premises in trust for the said Patrick M'Loughlin absolutely, subject to the amount paid by me on foot of the mortgage to Patrick Forde."

For the purpose of ascertaining the truth about the ownership of this property—because I absolutely decline to ascribe to Mr. Justice Boyd any intention except to ascertain the truth—the husband and wife are brought up for examination, and these documents, clear and explicit, are produced.

The object of such examination is to get at the truth, and the judge must be guided in the exercise of his discretion as to the mode of examination by this. He has a perfect right to form his own opinion as to whether a witness is telling the truth or not, and to put such questions himself, and to allow counsel to pursue such method of examination as the judge thinks necessary for the purpose of ascertaining the truth.

The Lord Chancellor has made some general observations as to the nature of examinations in these cases, but I do not understand that he or Lord Justice Molony suggests that the examination in this case was not conducted according to the usual practice, or that any improper question was put by either judge or counsel. I certainly have heard nothing of the kind in the evidence as read.

The Lord Chancellor has read several passages from the examination of the bankrupt. To my mind, from beginning to end he fenced (to use the Lord Chancellor's term) with every question; he obviously lied, and contradicted himself in a way which showed, to put it mildly, that he displayed no desire to tell the truth.

The general character of the wife's examination was of the same class.

A number of cases have been cited. I take the judgment of Holmes L.J., in *In re Conway* (1). He points out that the jurisdiction under sect. 385 is one to be exercised with the greatest caution. "In the cases of committal under the section he was intimate with, it was shown that immediately before the bankruptcy the bankrupt had in his possession a definite sum of money, or some definite article or chattel of which he failed to give a satisfactory account subsequent to the bankruptcy. The invariable answer in such cases was he 'could not tell.' The courts had come to the conclusion that the bankrupt in such cases had stated what was false, and they had committed in the hope that he would see the expediency of making a full statement." Therefore, the object of the committal is not to punish, or to convict a person of perjury, but to try and induce him to give a candid and satisfactory account of the matter. What are we to say to a witness who from the start begins to fence and shuffle, and continues to do so to the end of his evidence?

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(1) 46 I. L. T. R. 243, at p. 244.

I take the case in the Exchequer of *Ex parte Lord* (1). Alderson B. remarks to counsel in the course of the argument:—"You say a consistent falsehood is to satisfy the commissioner?" "Is not the criterion whether a reasonable man would believe the story told by him?" Parke B. says:—"If we think the commissioner exercised a sound discretion in disbelieving the bankrupt's story, we ought to leave him where he is." Pollock C.B. says:—"It would not be sufficient to say that some of the answers were unsatisfactory, because they might be cleared up by others. The answers are unsatisfactory upon the whole, as answers to the inquiry respecting the money alleged to have been stolen." Parke B. then says:—"We must take the examination as a whole, it being all directed to one object."

These cases appear to me to establish:—

1. That the examinations must be taken as a whole.

2. That the judge is bound to consider whether a reasonable man would believe the witnesses' story.

3. That if the judge was of opinion that the witness was not making a true and candid statement, but was fencing and lying, he should consider whether a committal for a short time might not have the effect of inducing him to make a full and true statement of the facts.

It is not necessary, in my opinion, in this case to go the full length of Baron Parke's statement—"If we think the commissioner exercised a sound discretion in disbelieving the bankrupt's story, we ought to leave him where he is." But I think that if the judge thinks the statement substantially false on the whole, it is a very important consideration.

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(1) 16 M. & W. 462.

I suggested during the argument that the demeanour of the witness might be an important consideration in these cases. I think the Lord Chancellor expressed dissent from this; but as at present advised, it seems to me that it is a very important element when the evidence as reported is such as in the present case.

I quite agree with the principle that the jurisdiction must be exercised with the greatest caution; but I also think that this Court should exercise great caution in interfering with the discretion of a judge in dealing with evidence when the witnesses were examined in his presence. If I thought that the real ground of the committal was that the answering was "unsatisfactory to *the assignees*," and that the judge did not act impartially (the Lord Chancellor, of course, did not mean this), or because the bankrupt would not admit that the property was his, I should concur in reversing the order.

In my opinion the order was made on the ground that the evidence of both witnesses as a whole was characterized by fencing and shuffling, and a desire to avoid giving any definite answers if possible; that it was plainly not candid; that the judge was entitled to form the opinion that it was false, and justified in coming to the conclusion that a committal might induce the witness to make a full, true, and candid statement.

Molony L.J.—

The bankrupt, Patrick M'Loughlin, built a house in Ballinamore on a plot of ground of which he had obtained a lease for ninety-nine years at a rent of £8. In the course of the erection of the house he borrowed money from a man named Forde, who took a mortgage of the premises.

The bankrupt married in February, 1909, and on the 6th of April of the same year he and his mortgagee assigned the premises to Ellen M'Loughlin absolutely, the mortgage debt to Forde being paid by Ellen M'Loughlin out of her own moneys.

The premises were put up for sale in May, 1913, by Patrick M'Loughlin. The abstract showed the title to be in Ellen M'Loughlin, and a vendor and purchaser summons was brought, which resulted in an order being made by Mr. Justice Barton—subsequently affirmed by this Court—that good title had not been shown by Patrick M'Loughlin as vendor.

On the hearing of the summons before Mr. Justice Barton affidavits were sworn by the bankrupt and his wife with the object of showing that the wife held under a parol trust for the husband. Before Barton J. the question of a parol trust was mainly argued, while in this court it was contended that the husband was acting as agent for the wife in putting up the premises for sale.

An action for negligence was subsequently brought by the bankrupt against his solicitor, Mr. Kiernan, in respect of these proceedings. The action was unsuccessful, and Patrick M'Loughlin has now been adjudicated a bankrupt by his former solicitor in respect of the costs of same.

The petitioning creditor, acting under the provisions of sects. 306 and 307 of the Irish Bankrupt and Insolvent Act, 1857, summoned the bankrupt and his wife for examination, and both have been committed to prison in respect of the answers given by them.

The appeal is brought under the 385th sect., and it is therefore necessary to determine what is to be considered as unsatisfactory answering in order to justify a committal under that section.

In the case of *Ex parte Nowlan* (1) decided so far back as the year 1794, this qnestion was considered. Lord Kenyon there lays down that where it is impossible for any reasonable mind to be satisfied with the answers the bankrupt has given, if all the examinations be considered together, this would justify a committal. Ashurst J. says:—"It would be a ridiculous ceremony for the commissioners to go through in examining a bankrupt if they were bound to give credit to his account, however improbable or absurd it might be, merely because he has the effrontery to swear to it." Grosse J. puts the case on the ground that "it is impossible for any person to believe the story the bankrupt has told."

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(1) 6 T. R. 118.

The question was considered in this country in *In re Felix M'Cann* (1), and Lynch J. there based the committal on the ground that the story told by the witness was such as no reasonable man could believe.

The recent Irish cases of *In re Garvine* (2) and *In re Conway* (3) show that the object of the examination is to enable the assignees to collect or realize the property of the bankrupt. If a person is committed for unsatisfactory answering, it is not as punishment, but as a process to enable the object of the examination to be achieved.

It is somewhat difficult to define the cases in which a judge would be entitled to commit a person for unsatisfactory answering, but taking into consideration the cases I have referred to, I think it may be said :—1. An unsatisfactory answer is one which the Court thinks no reasonable man could believe to be true. 2. In considering whether the answering, taken as a whole, is unsatisfactory, the Court is entitled to have regard to the fact that the witness equivocated and contradicted himself in the course of the examination. 3. The answers must be material to the interest of the assignees in dealing with the bankrupt's estate.

In the present case, I cannot say that the evidence is unsatisfactory within the meaning of the statute. True, the witnesses contradicted their affidavits sworn in the Chancery Division, but they may still have been telling the truth in the Bankruptcy Court, and for my part, looking at all the circumstances, I cannot see any evidence on which I could come to the conclusion that the evidence given in the Bankruptcy Court was necessarily, or even probably, false. I cannot help thinking that the real object of the examination was to get the female witness to give up the claim which she had made and insisted upon to the property, and which was supported by the deed of conveyance to her executed six years previously. No doubt the witnesses gave false evidence either before the Chancery Court or in the Court of Bankruptcy, but that the jurisdiction is not to be exercised for the purpose of punishing a witness has been laid down in this Court in both *Garvine's Case* (2) and *Conway's Case* (3).

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(1) 9 Ir. Jur. N. S. 77. (2) 4 New Ir. Jur. 18. (3) 46 I. L. T. R. 243.

I agree with the judgment and conclusions of the Lord Chancellor, and I think that both the bankrupt and his wife, Ellen M'Loughlin, ought to be discharged.

Solicitor for the appellants: *Patrick Campbell.*

Solicitor for the respondents: *Horan & Devine.*

J. G. T.

CONGESTED DISTRICTS BOARD FOR IRELAND v. PATRICK CONNOR AND ELLEN CONNOR.

K. B. Div.
1915.
Nov. 4.

Determination of a Tenancy by Disclaimer—Evidence of such Disclaimer—Form of Vesting Order made in pursuance of sect. 79 of the Irish Land Act, 1903—Powers of the Irish Land Commission exercisable in the name of the Commission by the Estates Commissioners—Effect of such Vesting Order.

A tenancy to which the provisions of the Irish Land Acts apply may be determined by disclaimer on the part of the tenant. A claim to have acquired the fee-simple interest in the lands by the operation of the Statutes of Limitation amounts to such a disclaimer.

A vesting order made in the name of and under the seal of the Irish Land Commission, and signed by two of the Estates Commissioners, complies with the provisions of sect. 79, sub-s. 1, of the Irish Land Act, 1903.

CASE STATED by Kenny J. on the hearing of a civil-bill appeal upon a civil-bill process for ejectment on the title brought by the plaintiffs against the defendants.

The following facts were found by the learned judge for the purposes of the special case:—

1. In 1861 the late Lord Ventry, under an indenture of settlement, executed on the occasion of his marriage, became tenant for life of his estates.

2. In the year 1884 one of his tenants, named Batt Connor, who was then tenant of the holding which is the subject-matter of the present appeal, was proceeded against by way of ejectment for non-payment of rent, and a civil-bill decree for possession obtained (1).

3. No action appears to have been taken on this decree. The landlord never took possession, and it is to be assumed that Connor's tenancy was in existence at the date of Lord Ventry's death.

4. Lord Ventry died in February, 1914, and the defendants in this case claim through the said Batt Connor, and represent whatever interest he had in the holding.

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(1) The Civil Bill Decree certifies six years' rent as due up to the 25th March, 1884. It thus appears that the tenancy in the holding was in existence prior to 22nd August, 1881.—ED.

5. It is admitted that, as between Lord Ventry, tenant for life of the estate, and the owners of Batt Connor's interest in the holding, no action could have been maintained by Lord Ventry for recovery of possession of the latter. There was no payment of rent and no acknowledgment of title since the year 1884, and Lord Ventry was not in possession of the lands.

In the year 1913—in Lord Ventry's lifetime—the plaintiffs, the Congested Districts Board, purchased the Ventry Estate under the powers contained in the 79th section of the Irish Land Act of 1903, and on the 31st March, 1913, a vesting order was made by the Irish Land Commission, vesting the estate in the plaintiffs, subject (as provided by the 16th section of that Act) to any interests of the tenants on the lands.

6. After Lord Ventry's death the defendant, Patrick Connor, claimed to be owner-in-fee of his said holding, and, as evidence of such claim, a letter from his solicitor, Mr. O'Connell, to the secretary of the Estates Commissioners, dated the 15th July, 1914, was given in evidence. That letter distinctly claims the fee-simple.

7. The civil-bill ejectment on the title was heard by the county court judge in June, 1914, and a decree for possession was made on the 20th June, 1914. The appeal before me was from that decree. Conner K.C, for the defendants, submitted propositions by way of defence:—

(*a*) That the Settled Land Act cannot be invoked in order to validate the sale to the plaintiffs, inasmuch as Lord Ventry was not in possession of the holding.

(*b*) That this is not a claim by a remainderman on the death of the tenant for life, as the plaintiffs do not stand in that relation.

(*c*) That the tenancy in the holding is preserved by the vesting order, and has never been determined.

(*d*) That the vesting order does not purport to be made by the Estates Commissioners, but by another body, namely, the Land Commission, and is bad.

I regarded some of these propositions as very important, and, if maintainable, as seriously affecting the working of the Irish Land Purchase Acts, and, accordingly, I decided upon stating a case for the opinion of the Court.

The question for the Court is, whether under the circumstances the plaintiffs are entitled to maintain their ejectment.

If the Court decides that they are entitled, the decree for possession should be affirmed with costs below, as given by the decree, and £4 13*s.* costs of the appeal.

If the Court decides that the plaintiffs are not so entitled, the decree should be reversed, and the civil bill dismissed, with £1 1*s.* 6*d.* costs in the Court below, and £6 1*s.* costs of appeal and of a previous adjournment.

Arthur Clery and *H. D. Conner K.C.*, for the defendants:—

The vesting order made in this case is not in accordance with the statutory requirements, and is not effective. It is made by the Land Commission, and not by the Estates Commissioners, as provided by sect. 79, sub-s. 1, of the Irish Land Act, 1903 (1).

Under the Settled Land Acts the tenant for life cannot exercise his powers unless he is in possession: Settled Land Act, 1882, sect. 2, sub-s. 5, and s. 3. Here Lord Ventry was not in possession. Every sale under the Land Acts is a sale under the Settled Land Acts: *Massereene's Estate* (2). The Congested Districts Board are not remaindermen.

In any event the interest vested by the vesting order is expressly subject to all tenancies, and the defendant's tenancy has never been determined, and is still subsisting: Land Law (Ireland) Act, 1881, sect. 20; *M'Donnell* v. *Blake* (3).

Further, a disclaimer on which the landlord can rely must have been made before action brought: *Doe d. Lewis* v. *Cawdor* (4), and the letter of the 15th July, 1914, on which the plaintiffs rely, was written after the present proceedings had been first instituted.

R. G. L. Leonard and *A. C. Meredith K.C.* (with them *Serjeant Sullivan K.C.*), for the plaintiffs:—

The vesting order must necessarily be made in the name of the Irish Land Commission. The Estates Commissioners are merely particular members of that corporation to whom the execution of certain functions of such corporation is assigned by statute, but in the whole land purchase code there is no statutory power of making vesting orders given to any person or corporation except to the Irish Land Commission. The certificate to be given by the Estates Commissioners, as provided by sect. 79, sub-s. 1, of the Act of 1903, was the only condition precedent necessary to give the Irish Land Commission jurisdiction to make the vesting order in this case.

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(1) See foot-note, *post*, p. 615.

(2) 40 I. L. T. R. 16.

(3) 28 L. R. Ir. 395, at p. 401.

(4) 4 Tyr. 852

The estate conveyed by the vesting order is subject to any interests of the tenants in the land; but as regards the lands now in question, there was no such tenancy. It was long since determined by disclaimer. Sect. 20 of the Act of 1881 can in no event be more than an inclusive enumeration of the cases where a tenancy is determined through operation of a notice to quit or notice of surrender, and determination by disclaimer is not a case of a notice to surrender. The principles governing determination of a tenancy from year to year by disclaimer are laid down in: *Doe d. Calvert* v. *Frowd* (1); *Doe d. Gray* v. *Stanion* (2); *Vivian* v. *Moat* (3). A claim to have become entitled as owner in fee simple by virtue of the Statute of Limitations is necessarily inconsistent with the continued existence of a tenancy, and accordingly amounts to a disclaimer. In the present case the defendants have long since taken up that position, and the plaintiffs rely on the letter written by the defendants' solicitor merely as evidence of the claim made by the defendants long previously.

MADDEN J.:—

This is an action of ejectment brought by the Congested Districts Board against the representatives of one Batt Connor, who was, in 1884, a tenant on the Ventry estate. It appears that in that year a civil bill for ejectment was brought, and a decree for possession obtained, by Lord Ventry against Connor; but no action was ever taken upon it. From 1884 to 1914 no rent appears to have been paid by Connor, or any person claiming under him. Lord Ventry was tenant for life of the property, which included Connor's holding. An agreement for sale to the Congested Districts Board was entered into which was carried out by the vesting order before me, dated the 31st March, 1914. That agreement was made under sect. 79 of the Land Act of 1903, and the argument has turned on the powers of the Congested Districts Board and the Land Commission under that section. [His Lordship read sect. 79 (1).] At the time of the agreement, Lord Ventry was tenant for life. He was certified as a person who might be dealt with as owner, and as tenant for life he comes within that description.

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(1) 4 Bing. 557, at p. 560.

(2) 1 M. & W. 695, at p. 703.

(3) 16 Ch. D. 730.

The vesting order is under the seal of the Land Commission, and it is signed by two of the three Estates Commissioners. It is contended that it is not made by the Estates Commissioners. But how could they make the order in any other way? The Estates Commissioners are the three members on whom this special duty is laid. They have no separate seal, and are justified in making an order under the seal of the Land Commission. I have not been referred to any other provision for making vesting orders by the Estates Commissioners, and it is necessarily involved that they should annex the seal of the Land Commission. It is quite intelligible why the persons to certify should be the Estates Commissioners. They are the persons to deal with such questions, and the Congested Districts Board are a different body. The policy of the statute is to vest the fee simple in the Congested Districts Board, and the procedure in the present case has been carried out by a certificate and order which are perfectly valid.

The estate in remainder, on the death of Lord Ventry, is vested in the plaintiffs. It is said that Connor's representatives were not served with a notice to quit or demand of possession. If a position is taken up which is inconsistent with the existence of a tenancy, no notice to quit is required. The defendant asserts rights wholly inconsistent with his being a tenant, for he claims the fee simple. This position was not taken up by him after

(1) Sect. 79, sub-s. 1, of the Irish Land Act, 1903, is as follows:—"The Congested Districts Board may enter into agreements for the purchase of land from any person who may be certified by the Estates Commissioners to be a person who may be dealt with as the owner of the land in accordance with the provisions of Part One of this Act or otherwise, and those Commissioners shall, in such manner as may be prescribed by rules to be made by the Lord Lieutenant, prepare all such agreements and make orders consequential thereon vesting land in the trustees of the Congested Districts Board."

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action brought. Though the letter referred to in the case was written after action brought, it is only evidence of the position which was taken up by him throughout.

The plaintiffs are, in my opinion, entitled to judgment in the ejectment.

BOYD and DODD JJ. concurred.

Solicitor for the plaintiffs: *J. O'Connor.*
Solicitor for the defendant: *John O'Connell.*

A. E. C.

K. B. Div. 1916. Oct. 27.

THE KING (PATRICK CURTIS) *v.* THE JUSTICES OF COUNTY LOUTH (1).

Criminal Law—Certiorari—Property in the hands of Police—Order of Petty Sessions—Police (Property) Act, 1897 (60 & 61 *Vict. c.* 30), *s.* 1, *sub-s.* 1.

Sect. 1 of the Police (Property) Act, 1897, applies whenever the property is in possession of the police for the purpose of a criminal prosecution, no matter from whom or in what way it came into their hands.

CERTIORARI.

Application to make absolute a conditional order of certiorari. The prosecutor, Patrick Curtis, was a licensed pawnbroker, and carried on business at Church Street, Dundalk. On the 1st, 2nd, and 5th March, 1915, William Lennon, a plumber, pawned with the prosecutor in the ordinary way certain plumber's tools, obtaining an advance amounting to £1 5*s.* upon them. In the month of September, 1915, the goods not having been redeemed, were placed in the window of the prosecutor's shop for sale. Some time after Sloane, who was a foreman, with one M'Adorey, a builder, came into the shop, and alleged that the goods belonged to M'Adorey. On the 7th December, 1915, Sergeant Levinge, R.I.C., Dundalk, came and asked the prosecutor to let him have the goods for the purpose of identification, and the prosecutor gave them to him, receiving a receipt for them. On the 2nd February, 1916, a notice was served on the prosecutor on behalf of James M'Adorey, that

(1) Before CHERRY L.C.J., and MADDEN and DODD JJ.

M'Adorey intended to apply to the justices for an order that the goods be delivered to him. When the application came before the justices, it was stated on behalf of the police that the Lord Lieutenant had cancelled the warrant against Lennon; and James M'Adorey's application for the delivery of the goods was thereupon refused by the justices. The following notice was then served on the prosecutor by the District Inspector of Police:—

District Inspector's Office,
R. I. Constabulary,
Dundalk,
10-5-6.

Sir,

Please take notice that I intend to apply to the magistrates at Dundalk Petty Sessions on Friday, 12 inst., for an order as to the disposal of tools alleged to have been stolen from Mr. James M'Adorey by William Lennon, and which were handed over to the police by Mr. Patrick Curtis, pawnbroker, Dundalk.

I am, Sir,
Your obedient servant,
T. D. Norris,
D.I., R.I.C.

The following was the certificate of the order made upon this notice, when the matter came up for hearing before the justices:—

Petty Sessions (Ireland) Act.

I certify that upon hearing of an application by T. D. Norris, Esq., D. I., R. I. C., Dundalk, for an order for the disposal of certain goods—to wit, one plumber's furnace, one force-pump, one set of chain-cutters, one wheel pipe-cutter, one plumber's ratchet—alleged to have been stolen from Mr. James M'Adorey by William Lennon, and which were handed over to the police by Mr. Patrick Curtis, pawnbroker, Dundalk; said property having come into the possession of the police in connexion with a criminal charge against the said William Lennon for the larceny of same, an order was made on the 17th day of May, 1916, by the justices present, to the following effect, viz.:—We hereby order the delivery of said property to Mr. James M'Adorey, the person appearing to the Court to be the owner thereof.

(Signed), Bernard Hamill,
Justice of said county.

This 18th day of June, 1916.

Dickie K.C., and *James Henry*:—

Here the goods were only given over for purposes of identification. There was no conviction. The section does not apply to such a case: *Packer* v. *Gillies* (1); *Davis* v. *Morrison* (2); *Parker* v. *Patrick* (3); Byrne on Pawnbrokers, p. 18. The goods must come into the possession of the police with the prisoner. All the Acts mentioned in the section refer to cases where the goods come into possession with the prisoner. The section was only meant to meet the difficulty where a man is acquitted, or escapes, or if the prisoner died.

The Solicitor-General (*James O'Connor*) and *Cusack*, for the Justices:—

The goods have come into the possession of the police in connexion with a criminal charge. This is sufficient to bring the jurisdiction into operation, as the section is very wide.

John Bartley, for James M'Adorey.

The judgment of the Court was delivered by Cherry L.C.J.

CHERRY L.C.J.:—

This is a clear case. It turns on the Police Property Act, 1897, sect. 1, sub-s. 1 (4). Lennon pledged certain contractor's plant with a pawnbroker. An employee of M'Adorey saw the goods, and identified them as belonging to M'Adorey. The pawnbroker gave them up to the police. A warrant against Lennon was quashed by

(1) 2 Camp 336, *note*. (2) Lofft. 185. (3) 5 T. R. 175.

(4) The sub-section is as follows:—

"Where any property has come into the possession of the police in connexion with any criminal charge, or under section sixty-six of the Metropolitan Police Act, 1839, section forty-eight of the Act of the session of the second and third years of Her present Majesty, chapter ninety-four (local), for regulating the police in the city of London, section one hundred and three of the Larceny Act, 1861, or section thirty-four of the Pawnbrokers Act, 1872, a Court of summary jurisdiction may, on application either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or Court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or Court may seem meet."

the Lord Lieutenant. The question is whether the goods come within the section, which is very general in its terms, and is merely intended to relieve the police, while leaving unsettled any question as to the true ownership. [His Lordship read the section.] Mr. Dickie's argument is that the section only applies where the property comes into the possession of the police together with the accused person. There is nothing to limit the section in such a way. It applies whenever the property is in the possession of the police for the purpose of criminal prosecutions, no matter from whom or in what way it comes into their hands.

The certiorari must be refused with costs.

Solicitor for the prosecutor: *Robert Dickie.*

Solicitor for James M'Adorey: *E. C. Ward.*

Solicitor for the Justices: *The Chief Crown Solicitor.*

A. E. C.

STEVENSON *v.* ORR AND OTHERS (1).

K. B. Div.
1916.
June 29.
Nov. 1.

Rating—Turbary—Valuation—No Appeal from Valuation or Rate—Claim for Rates—Defence—Exemption from Rateability—Conclusiveness of Rate—Valuation (Ireland) Act, 1852 (15 & 16 *Vict. c.* 63), *s.* 12.

A right of taking turf may be a separate rateable hereditament, apart from the lands upon which it is exercised. There is jurisdiction under the Valuation Act, 1852 (15 & 16 Vict. c. 63), s. 12, to make a separate valuation of turbary.

Held, without deciding whether the turbary in the present case was or was not liable to rates, that as the defendants had not appealed from the valuation or from the striking of the rate, they could not, by way of defence to an action for rates, raise any question as to the correctness of these decisions.

Whaley v. *The Great Northern Railway Co. of Ireland*, [1913] 2 Ir. R. 142, 171, followed.

Case Stated by Ross J., on the hearing before him, at the Summer Assizes, 1916, for the County of Londonderry, of a civil bill appeal, in which the plaintiff was the appellant.

The civil bill was brought to recover a sum of £3 6*s*. 5*d*. for rates, alleged to be due in respect of certain turbary vested in the

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(1) Before Cherry L.C.J., and Gibson and Kenny JJ.

K. B. Div. 1916.

STEVENSON *v.* ORR.

defendants, as trustees for occupying tenants, who had purchased their holdings under the Land Purchase Acts.

The turbary in respect of which the rates sought to be recovered were struck was originally the property of Vincent Carlyle Henderson, and others, who sold to the occupying tenants under the provisions of the Irish Land Act, 1903; and it was one of the terms of the sale that certain rough grazing, containing 109 acres and 25 perches, with turbary upon it, in the landlords' hands, over which the tenants formerly cut turf, under permits issued by the landlords, should be sold to the tenants, and conveyed to trustees to hold and manage for them.

In pursuance of the purchase agreement, this grazing and turbary were by vesting order of the Estates Commissioners of 21st of November, 1912, vested in the defendants and respondents in trust for the occupying tenants, subject to an annuity of £4 17*s.* 6*d.* Pursuant to sections 4 and 20 of the Irish Land Act, 1903, a scheme had been drawn up on the 3rd of October, 1911, setting out the trusts upon which the trustees held the grazing and turbary for the purchasers. The following were the material portions of the scheme:—The trustees were "to permit the purchasers (and where the reasonable requirements of the purchasers shall have been provided for, such other persons in the neighbourhood as to the trustees may seem fit) to cut, make, and save turf upon the trust estate, at such times and places, upon such conditions, and subject to such regulations as to payment or otherwise, and as to the preservation of the existing turf banks, or the laying out of new banks in lieu thereof, as the trustees may from time to time direct or prescribe (and in particular subject to the conditions and regulations next hereafter set out). Without prejudice to any other powers and authorities vested in the trustees under these presents the trustees shall have the special powers following:—Power to fix, according to an uniform scale, the annual or other contribution to be made by each of the purchasers towards the payment of the annuity payable in respect of the advance made by the Irish Land Commission, to enable the trustees to purchase the trust estate, and towards the costs and expenses of or incidental to the purchase of the trust estate, and the conveyance of the same to the trustees, and of or incidental to the preparation and execution of these presents, and the carrying out of the trusts thereof, including the remuneration of any agent or servant employed by the trustees in connexion therewith, and the payment of all rates, taxes, assessments, impositions, and outgoings charged upon the trust estate, or properly payable in respect thereof; power to make, do, and execute all such deeds, acts, and things as they may deem necessary or proper for giving effect to these presents. All moneys received by the trustees that may not be required for the payment of the said annuity, payable in respect of the trust estate, and for the payment of necessary expenses of the management thereof, shall be laid out by the trustees in the improvement and development of such estate, with a view to the several purposes contemplated by these presents, or otherwise applied by them as the Lord Lieutenant may from time to time direct. If the trust estate, or any part or parts thereof, shall be no longer required for any of the purposes contemplated by these presents, the same may be sold, or otherwise disposed of, for such public purposes as the Lord Lieutenant may approve, and the net proceeds (if any) of any such sale shall be applied as the Lord Lieutenant shall direct. No purchaser shall be entitled to take any benefit under these presents, unless he or some of his predecessors in title to his holding shall have signed an agreement in writing, undertaking for himself and his assigns to pay all annual or other contributions, and to observe and perform all regulations that may be from time to time lawfully fixed or made by the trustees in respect of the trust estate, or in default thereof to forfeit all his rights thereunder, and any purchaser whom the trustees shall declare in writing to be in such default shall, as from the date of such declaration (but subject to the right of appeal hereinbefore provided for), cease to be a purchaser within the meaning of these presents."

No part of the turbary had been let or sold to persons other than those named in the schedule to the scheme. The turbary had been exclusively used for the purpose of cutting and saving turf by the present owners, and the defendants made no profit out of the turbary, only such sums being levied under the scheme as were necessary to pay the annuity and costs of management. The several persons named in the schedule paid to the defendants a yearly levy of 5*s.* each, and no person who had failed to pay that sum would be permitted to cut turf.

The land contained in the vesting order was rated, and the defendants had paid the current rates due in respect thereof. In 1914 the turbary upon the 109 acres and 75 perches was valued by the Commissioner of Valuation under the several Acts relating to the valuation of rateable property in Ireland. It was valued under the heading of "Turbary" at £5, and upon this valuation the county council on the 18th April, 1914, struck a rate at 4*s.* 8*d.* in the pound, and one farthing separate charges.

The defendants refused to pay the rates, and raised the defence that under the proviso to sect. 12 of the statute 15 & 16 Vict. c. 63, they were not liable.

For the plaintiff the point was taken that, assuming that the turbary was not rateable, this could only be raised by way of appeal either from the valuation or from the rate, and the case of *Whaley* v. *G. N. Railway Company* (1) was relied on, and it was further argued that in any event the tenants were in occupation of the turbary, and paying rent therefor, namely, the yearly levy paid by each tenant under the trust deed, and also the annuity paid under the vesting order. It was also argued that the purchase-price of the tenant's holdings (which included the right of turbary) was a "valuable consideration" payable in respect of the turbary.

For the defendants it was argued that the rate was bad, and made without jurisdiction, inasmuch as no rent was paid for the turbary; that the trustees had no beneficial interest, and that their occupation was the occupation of the tenants as a whole, who are beneficial owners of the turbary in fee-simple, and paid no rent to anybody, the annuity paid under the vesting order being paid in redemption of the purchase-money advanced by the Land Commission. It was further contended that as the rate was bad, and made without jurisdiction, its invalidity could be raised by way of defence.

The Recorder of Derry dismissed the action, whereupon the plaintiff appealed to the Judge of Assize, and on the hearing of that appeal Ross J. stated this case, the questions for the opinion of the Court being: (1) Is the turbary vested in the trustees under the aforesaid scheme liable to rates? (2) If not, does such non-liability afford a defence to this action?

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(1) [1913] 2 I. R. 142, 171.

E. S. Murphy and *Henry K.C.*, for the plaintiff.

Babington and *Wylie K.C.*, for the defendants.

The nature of the arguments appears sufficiently from the judgments.

CHERRY L.C.J.:—

The civil bill in this case was brought to recover a sum of £3 6*s.* 3*d.* for rates alleged to be due by the defendants in respect of certain turbary vested in them as trustees for certain purchasing tenants, upon the sale of an estate under the Land Purchase Act, 1903. The action was dismissed by the Recorder of Londonderry, but the grounds of his decision are not stated to us. An appeal was taken from this dismiss to the Judge of Assize, Mr. Justice Ross, who has stated two questions of law for our decision:—

1. Is the turbary vested in the trustees liable to rates? and

2. If not, does such non-liability afford a defence to the action?

The turbary in respect of which the rate sought to be recovered was struck was sold to the occupying tenants under the Irish Land Act, 1903, and it was one of the terms of the sale that certain rough grazing, with turbary upon it, in the landlord's hands, over which the tenants formerly cut turf, should be sold to the tenants and conveyed to the trustees, to hold and manage for them. This arrangement was carried into effect, and pursuant to sects. 4 and 20 of the Land Act, 1903, a scheme was proposed setting out the trusts upon which the grazing and turbary were to be held. The material portions of this scheme are set out in the fourth paragraph of the case stated, and among other powers vested in the trustees was one to fix, according to a uniform scale, the contribution to be made by each of the purchasers towards the payment of the annuity payable in respect of the advance made by the Irish Land Commission to enable the trustees to purchase the trust estate, and towards the costs and expenses of the management of the property. The defendants make no profit out of the turbary, only such sums being levied under the scheme as are necessary to pay the annuity and cost of management. The main contention of the defendants is that these payments are merely contributions towards expenses, and cannot be held to be "rent or other valuable consideration" payable to the trustees within the meaning of the proviso (1) in sect. 12 of the Valuation Act, 1852 (15 & 16 Vict. c. 63), so as to enable the turbary to be "deemed rateable" under the Act as a separate hereditament.

In 1914 the turbary upon the land subject to the scheme was valued by the Commissioner of Valuation under the several acts relating to the valuation of rateable property in Ireland. It was valued (apart from the land itself, which is also valued) under the heading of "turbary" at £5, and upon this valuation the County Council on April 18th, 1914, struck a rate at 4*s.* 8*d.* in the £. A rate-book was regularly prepared containing an entry of this valuation, and a demand-note was duly served in respect of this rate, and everything was regularly done for the enforcement of the rate. No appeal was taken either from the decision of the Commissioner of Valuation or from the striking of the rate by the County Council. The point is now raised by the plaintiffs that the defendants, not having appealed from the decision of either authority, are bound by the decisions in the matter, and the case of *Whaley* v. *Great Northern Railway Company* (2) is relied upon by the plaintiff. The defendants on the other hand contend that *Whaley's Case* (2) does not apply, inasmuch as there was no question there raised as to the jurisdiction to levy a rate, and they say that in the present case there is no jurisdiction to levy a rate in respect of the turbary as distinct from the lands.

In my opinion they are wrong in this contention. The twelfth section of the Valuation Act, 1852, I think plainly shows that there is jurisdiction to make a separate valuation of turbary, and that a right of taking turf may be a separate rateable hereditament apart from the lands upon which it is exercised.

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(1) Section 12 of the Valuation (Ireland) Act, 1852, enumerates the hereditaments which shall be deemed to be rateable and, among other provisos, contains the following:—"Provided always that no turf-bog or turf-bank used for the exclusive purpose of cutting or saving turf, or for making turf-mould therefrom, for fuel or manure, shall be deemed rateable under this Act, unless a rent or other valuable consideration shall be payable for the same."

(2) [1913] 2 I. R. 142, 171.

This conclusion is confirmed by the schedule to the Act of 1860 (23 Vict. c. 4), which gives a specimen sheet of valuations, one of which is inserted in respect of turbary alone. If there is jurisdiction, as I think there is, in the Commissioner of Valuation to treat turbary as a separate rateable hereditament, there must be also jurisdiction for him to determine whether or not the case comes within the proviso at the end of the section, which exempts turf from rateability, unless a rent or other valuable consideration is payable for the same. It follows from this that *Whaley's Case* (1) is a conclusive authority against the defendants, and that they cannot rely upon the contention that the present case comes within the proviso. If I am correct in this conclusion, it follows that it is unnecessary for us to answer the first question stated by the learned judge. It is sufficient for us to say that the defendants, not having appealed from the valuation made by the Commissioner of Valuation, or from the rate struck by the County Council, cannot now raise any question as to the correctness of these decisions, and consequently the alleged non-liability to pay the rate does not afford a defence to this action.

Gibson J.:—

A decision against the defendants on either of the questions in the case would result in the reversal of the dismiss below. As the second question should, in my opinion, be answered negatively, I do not decide the first point, though, as the case may have to be considered by the Court of Appeal, and as the facts and legal considerations arising thereon to some extent enter into the discussion of the second question, I shall briefly notice them.

There is no evidence that the landlord was rated in respect of the rough grazing and turbary. How much was used exclusively for turf-cutting also does not appear. The exception given by sect. 12 of the Valuation Act, 1852, is confined, apparently, to the portion of the bog in immediate use, and does not extend to

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(1) [1913] 2 I. R. 142, 171.

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bog of possibly large acreage on which in future years turf might be cut. The expression is "used," not "not intended to be used," or "appropriated to be used." No argument was directed to the effect of the term "used," or whether some of the rough grazing may not be rateable. The point argued was as to valuable consideration only, and the nature of the defendants' occupation. The tenants would seem to have got permits of a revocable character, for which no payments were made. Turbary or turf would appear to be present in the entire acreage vested in the trustees; but how much is in active operation, and how the balance of the rough grazing is used, is not stated.

The tenants who bought were to enjoy turbary rights under the scheme of the 3rd October, 1911. The subsequent vesting order of the 21st November, 1912, was on the basis of the deed between vendor and tenants and trustees. The tenants might not have purchased without the benefit secured by the deed; the landlord might not have sold without provisions to protect the tenants against recurring contention with one another, to avoid which the trustees were entrusted with supreme dominion. The rate before us is confined to turbary, no acreage being stated. It must be taken to follow the valuation, which is not embodied in the case.

The powers of the trustees embrace control, fixing contributions, remuneration of agents and servants, payment of rates, and application of any surplus from the contributions to development and improvement of the estate, or otherwise as the Lord Lieutenant might from time to time direct. Where the trust estate was no longer required for the specified purposes, the same might be sold or otherwise disposed of for public purposes approved by the Lord Lieutenant.

The transaction might, in one point of view, be regarded as an administrative arrangement for the benefit of the purchasing tenants; in another, as putting the trustees in the position of occupying owners, with definite rights against tenants who were to pay for the benefits enjoyed.

Next, as to the Valuation Acts. "Lands" in sect. 12 would seem on the context to exclude commons, rights of common, and profits out of land, specified as distinct rateable hereditaments.

The proviso as to turf-bog and banks would, prima facie, describe the ground which would be included in "land." A right of turbary, as an incorporeal hereditament, would be a profit out of land, and rateable accordingly.

The form in the Act of 1860 (23 & 24 Vict. c. 4) refers to turbary only; but it must include also turf-bog and banks, which would be "land." The proviso in sect. 12, though literally applicable to turf-bogs only, as land, must extend to turbary as an incorporeal hereditament as well. Turf may be dealt with in many ways. 1, an owner may cut for his own use; 2, a tenant of a holding with turf on it may cut it, the rent issuing out of that part as well as the rest of the holding; 3, a tenant may have a right (for which he pays in his rent) to cut turf on his landlord's estate; 4, a right of turbary may be specifically sold or demised for valuable consideration. This last case and the first are clear. The second and third might present some ground for argument, if such facts should ever be presented for decision, which is unlikely.

On the application of the exempting proviso to the present case I express no opinion, but shall assume, in the defendants' favour, that if an appeal had been taken against the valuation or the rate, such appeal would have been successful, the turbary on the entire rough grazing being taken as actually used, and gratuitously so used, and the defendants as being occupiers within the exemption.

On that assumption I take up the second question. The broad principle of rating law is that where there is an appeal with a power of correction and amendment, an unappealed rate—and in Ireland valuation—is conclusive as a rule. The object is to secure finality, and avoid the dislocation of annual local finances, which would be caused by rates being successfully disputed long subsequently. The cases on the finality of rates are extremely strong, and many are relevant to the present discussion:—*Crease* v. *Sawle* (1); *Overseers of Poor of Manchester* v. *Headlam* (2); *The Churchwardens of Birmingham* v. *Shaw* (3); *Reg.* v. *Twopeny*

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(1) [1842] 2 Q. B. 862.
(2) 21 Q. B. D 96.
(3) 10 Q. B. D. 868.

and Others (1); *The King* v. *Trecothick* (2); *The Queen* v. *Justices of Kingston and Phillips* (3); *Ex parte May* (4), where see the judgment of Blackburn J.; *Wilson* v. *The Churchwardens of Sunderland* (5), where it was alleged that the Vestry, the rating authority, was improperly constituted; *Reg.* v. *Hannam* (6).

There were three exceptions to this rule of finality:—1, where the rate was bad on its face; 2, where the person rated was not occupier; 3, where the property rated was beyond the jurisdiction of the local rating authority, in which case usually the rate would be probably *ex facie* bad. See a late example of this: *Hunter District Board* v. *Newcastle Coal Company* (7). A fourth exception indicated by Bowen L.J. in *Reg.* v. *Hannam* (6) was where the exemption is enacted by a public Act of Parliament which as soon as it is read destroys the rateability without throwing any onus on the occupier of proving anything so as to gain exemption. This suggested exception was approved of in *Whenman* v. *Clark* (8). As a rate must describe the premises, if such premises, as described were free from rates by a general statute, the rate would be bad on its face. The ratebook in *Whenman* v. *Clark* (8) (see p. 98) described the Thames Conservators as owners, which in the opinion of the Court exonerated the premises from liability. In this view the rate was void on its face. I shall discuss this case later on.

The English Valuation Acts, such as 6 & 7 William IV, c 96, and the Act of 1862, differ widely from our code; and it has accordingly been decided in England that an appeal will lie against a rate notwithstanding that the objection on which the rate was attacked was not made to the valuation: *London and India Dock Co.* v. *Borough of Woolwich* (9).

Whaley's Case (10) is a conclusive authority that a valuation, on its face legal, is final in the absence of appeal; and two at least of the judges held that in similar circumstances a rate was immune from objection. It must be taken that the present rate follows the valuation, as it was bound to do. Each was good on the face. They follow the statutory form. It is suggested that this case shows that there was a double rating. I do not think so. Even if there was an overlapping, this would be ground of appeal only, as the cases already mentioned establish. It was not argued that the negative form of the proviso was in substance different from an affirmative declaration such as that only such and such turf bogs should be rated. It is not *malum prohibitum* to rate property which may or may not be exempted. The negative form of expression is of constant occurrence in the valuation statutes, *e.g.* the Act of 1852, sect. 16, on which there are many decisions by the House of Lords and other Courts, sect. 14, and others. In many cases where the absence of appeal was held conclusive the same form of language is found, *e.g. The Churchwardens of Birmingham* v. *Shaw* (1). *Whenman* v. *Clark* (2) is distinguishable for many reasons. The present case does not come within Bowen L.J.'s formula; the exemption depends on the existence of particular circumstances and conditions which the valuation officer and rating authority have to inquire into and judicially decide. *Murphy* v. *Lyons* (3) (as to the rating of the demesne) is here directly in point. See the judgments of Hayes J. at p. 29; O'Brien J. at p. 33. Again the English Public Health Act, 1875, sect. 256, directs that an order may be made by justices "if no sufficient cause for non-payment is shown." The view of the Court of Appeal in *Whenman* v. *Clark* (2) as to the effect of this phrase may be contrasted with that of Blackburn J. in *Ex parte May* (4), and seems opposed to the decision in *Reg.* v. *Hannam* (5), where the same section was relied on. Further, the English legislation is quite different from the Irish, as interpreted in *Whaley's Case* (6).

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(1) 17 L. T. N. S. 266.
(2) 2 A. & E. 405.
(3) E. B. & E. 256.
(4) 2 B. & S. 426.
(5) 17 C. B. N. S. 694.
(6) 34 W. R. 355.
(7) [1896] A. C. 82.
(8) [1916] 1 K. B. 94.
(9) [1902] 1 K. B. 750.
(10) [1913] 2 I. R. 142, 171.

Two of the Lords Justices in *Whenman* v. *Clark* (2) held that where the material facts were not in dispute a defence was competent. I doubt with Mr. Ryde in his work on Rating, 3rd ed., pp. 743–4, if the conclusive validity of an unappealed valuation of rate can depend on the accident of whether facts are admitted or disputed; it is the legal inference from these facts which is in controversy: *Overseers, &c., of the Savoy* v. *Art Union of London* (7).

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(1) 10 Q. B. D. 868.
(2) [1916] 1 K. B. 94.
(3) 17 Ir. C. L. R. 9.
(4) 2 B. & S. 426.
(5) 34 W. R. 355.
(6) [1913] 2 I. R. 142, 171.
(7) [1896] A. C. 296.

If there is a dispute, can the jurisdiction of the Court be affected when it finds what the true facts are? Contradictory evidence may be given before a judge of assize. He can embody his conclusions of fact in a case stated. Would a defence to the rate on the supposed principle I am discussing be excluded because there was a dispute, though such defence would be available if there was no dispute of fact? In *Crease* v. *Sawle* (1) the facts were ascertained by a special verdict, more conclusive than any admission. I refer to the point briefly, though it can hardly arise in Ireland, to guard myself from making jurisdiction depend on the behaviour of parties when the rate comes to be judicially enforced. The principle mentioned by Bowen L.J. does not go nearly so far.

In *Whaley's Case* (2) the facts were not controverted; if there had been an appeal, the valuation and rate would have been upset. If *Whenman* v. *Clark* (3) conflicts with the decision of our Irish Court, we must follow the latter. But, for the reasons already given, I am of opinion that *Whenman* v. *Clark* (3) is not applicable at all to the case before us.

KENNY J.:—

As in *Whaley's Case* (2) no objection or appeal to either the valuation or the rate was taken, and the plaintiff relies on the decision of this Court and of the Court of Appeal in that case as a conclusive authority establishing that in such circumstances as the present the defendants are precluded from relying on any objection to the valuation or the rate by way of defence to an action for the latter. The defendants' contention is, that *Whaley's Case* (2) is distinguishable on the ground that there the Commissioner of Valuation had jurisdiction to enter on the inquiry as to the value of the subject-matter, whereas, having regard to the language of the 12th section of the Valuation Act of 1852, he had no such jurisdiction in the present case, but, on the contrary, was expressly prohibited. It is admitted that if *Whaley's Case* (2) applies, the defence to this civil bill fails.

(1) 2 Q. B. 862.
(2) [1913] 2 I. R., 142, 171.
(3) [1916] 1 K. B. 94.

The case depends on the section of the Act of 1852 to which I have just referred, which sets out the several classes of hereditaments that are to be rateable. It is settled law, and I need not go into the authorities, that whatever the rateable hereditament may be the person to be rated must be in occupation. In *Whaley's Case* (1) the railway company were in occupation of part, at least, of the premises, and that circumstance is also relied on as having given the Commissioner of Valuation original jurisdiction, and thus differentiating it from the present case. But the main question is the construction of the section. Before adverting to it I wish to refer to my own judgment in *Whaley's Case* (1), which was not dissented from in the Court of Appeal. I held in that case that the only question in the case was, whether the rate sued for was made without jurisdiction, and that if there was authority to enter on the valuation in the first instance, and the defendant's case was merely one of exemption, the rate based on such valuation could only be challenged on appeal from the rate. If the valuation had been made without jurisdiction, a rate based on it would have been bad, but I held that the Commissioner of Valuation had jurisdiction to enter on his inquiry for the purpose of valuation, and there having been no objection or appeal from that valuation and no appeal from the rate itself, that the latter was recoverable. The Lord Chief Baron was a member of the Divisional Court in that case, and, while concurring in the result, based his judgment on the finality of the description of the rateable hereditaments contained in the valuation lists (see sect. 23 Valuation Act, 1852, and sect. 29 Local Government Act, 1871). The question therefore presents itself whether the Commissioner of Valuation had original jurisdiction in the present case. It is contended that the proviso at the close of the 12th sect. of the Valuation Act of 1852 amounts to a prohibition and took away any original jurisdiction in cases coming within it, and did not merely create an exemption, and this contention is put upon the ground that the subject-matter itself is taken away, and therefore there could be no exemption. This is somewhat subtile, but it seems to me that the question resolves itself into one of construction, it being admitted that if the proviso be held to constitute an exemption *Whaley's Case* (1) applies. If, on the other hand,

(1) [1913] 2 I. R. 142, 171.

the proviso on its true interpretation takes away the original jurisdiction to value and to rate, and, in fact, places the Commissioner of Valuation and the rating authority in much the same position as if they were dealing with a case in which the person proposed to be rated was not in occupation of the rateable hereditament, the objection is open in an action for the rate. Is, then, this proviso of the character of an exemption?

The distinctions between examples of an original want of jurisdiction and those of mere exemption seem to me to be in many cases of a very shadowy character. They were discussed in *Murphy* v. *Lyons* (1), where in the case of one provision of a special Belfast Act, which dealt with the "lighting" and "watching" of the borough, the Court held (FitzGerald J. dissentiente) that there was no original jurisdiction to rate; and in the case of another provision that it operated only by way of exemption. By the former, power to rate was given in respect of all hereditaments within the limits of the Act, but with a declaration that the council of the borough might from time to time direct what districts should be lighted and watched, and that occupiers of premises "not within the district so set out and lighted and watched" should not be subject to the payment of rates. The majority of the Court, Lefroy C.J., and Hayes and O'Brien JJ., were of opinion that inasmuch as the district in which the premises were situated was, as a matter of fact, neither watched nor lighted, there was no jurisdiction to lay on the tax. On the other hand, where a subsequent Belfast Act enacted that owners and occupiers of demesnes, of a certain character, within the borough, should not be rated in respect of such demesnes—the ground of objection was held to merely constitute exemption, and, therefore, to be only a subject of appeal. O'Brien J., in his judgment, at p. 33, points out that the objection to the rate was grounded on the extent and nature of the rated premises, and on the manner in which they were used—an observation which is very applicable to the present case. In the present case it is to my mind clear that the earlier part of the 12th section of the Act of 1852 confers an original jurisdiction for the rating of turbary; if it did not, the proviso as to turf bogs and banks would be quite unnecessary. That proviso implies that but for it all turbary would be within the earlier part of the section, and, consequently, rateable. The Commissioner of Valuation has then the duty cast on him of, in the first instance, placing a valuation on the thing so declared to be prima facie rateable. If he were satisfied that it was excluded from his jurisdiction by reason of its fulfilling the conditions of the proviso, he should, of course, exclude it from the list. But he has virtually said that the subject-matter does not fall within the proviso, and he in effect describes it as "rateable turbary." Who has the materials for showing that it does come within the proviso? Surely it is the person returned in the valuation list as the occupier of the hereditament, who by the statute is afforded an opportunity by objection and by appeal of establishing the circumstances which would exempt it from rateability. It seems to me that this case differs essentially from that of want of jurisdiction grounded on non-occupation, and following my own judgment in *Whaley's Case* (1), which met with no dissent in the Court of Appeal, I am of opinion that there was jurisdiction in the Commissioner of Valuation to enter on his valuation of this turbary, and that there not having been any appeal to Quarter Sessions from the rating founded on that valuation, it is too late now for the defendants to raise an objection to payment of it.

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(1) 17 I. C. L. R. 9.

But even if my view on this point was erroneous, it seems to me that the judgment of the Chief Baron in *Whaley's Case* (1), the grounds of which were expressly affirmed by the Court of Appeal, is conclusive in this case. He and the Court of Appeal held that the "description" of the hereditament in the Commissioner's list, no matter how erroneous, where the rate founded on it was unappealed from, was as binding on all parties as if there had been an appeal and a decision upholding the rate. As to the effect of a decision of Quarter Sessions on appeal from the rate this Court held in *Moore* v. *Boyd* (2), as was pointed out by the Chief Baron in his judgment in *Whaley's Case* (1), at p. 167, that for rating purposes, and in respect of the nature of the user of the premises, it was a judgment *in rem*, and binding on all parties.

Since these decisions the question as governed by the law of rating in England has been discussed by the case of *Whenman* v. *Clark* (1), where, in circumstances of exemption, as distinguished from absence of jurisdiction, it was held by Swinfen Eady and Pickford L.JJ. that a defence founded on exemption was available on an application to Justices for payment of the rate. But throughout their judgments, and that of Phillimore L.J., there are to be found qualifying observations indicating that the defence would only be available when there is no dispute about the facts. There was no question about the facts in the case before them, and the Court approved of and followed a dictum of Bowen L.J. in *Reg.* v. *Hannam* (2), who suggested that on a summons for payment exemption could be relied on where no onus is thrown on the occupier of proving anything so as to gain the exemption for his property. Pickford L.J. points out that for the purposes of such a defence the facts need not necessarily be admitted, because that would be "contrary to the allowance of an objection to the occupation of the person sought to be charged, which is often a very difficult and hotly contested question of fact." He goes on to add that he can find no principle underlying all the cases, and that he does not profess to lay down any, and that he thought the rules adopted from time to time were rules of convenience. In the case before us, Ross J. has for the purpose of the "case stated" found certain facts which might have been in controversy, and which unquestionably necessitated an inquiry. Such facts were not patent, and, if not admitted, could only have been substantiated by the persons rated, who were seeking to bring themselves within the proviso in the section.

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(1) [1913] 2 I. R. 142, 171.

(2) [1911] 2 I. R. 579.

It is manifest that *Whenman's Case* (1) does not touch the grounds of the actual decision of the Court of Appeal in *Whaley's Case* (3), which proceeded on the basis of the conclusive and binding character of the description in the valuation lists, and which is a binding authority on this Court. I am, therefore, of opinion that the second question in the case should be answered in the negative, and that the plaintiff is entitled to recover.

Solicitor for the plaintiff: *W. A. Lane.*

Solicitor for the defendants: *M. C. Feeny.*

C. L.

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(1) [1915] 1 K. B. 548; [1916] 1 K. B. 94.

(2) 34 W. R. 355.

(3) [1913] 2 I. R. 142, 171.

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BANKRUPTCY—ACT OF BANKRUPTCY—Intent to defeat or delay Creditors—*Departing out of Ireland—Proof of Intent—Being a Trader has departed from Dwelling-house, or begun to keep House—Debtor having ceased to be a Trader at time of alleged Acts—Bankruptcy* (*Ireland*) *Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 21, *sub-s.* 3—*Necessity of strict Proof of Requisites for Adjudication.*] Where the Act of bankruptcy relied on to obtain an adjudication is that the debtor has departed out of Ireland with intent to defeat or delay his creditors, it is necessary to establish such actual intent. The Court is not bound to presume such intent merely from the fact that creditors are thereby defeated or delayed. Where the act of bankruptcy relied on is that the debtor, being a trader, has departed from his dwelling-house, or otherwise absented himself, or begun to keep house, it must be shown that the debtor was a trader at the time of the alleged acts. *Ex parte M'George*; *In re Stephens*, 20 Ch. D. 697, followed. Necessity, before granting an adjudication in bankruptcy, of having proper legal evidence of the matters necessary to be proved, stated. *In re Radcliffe* - APP. 534

BANKRUPTCY — EXAMINATION OF WITNESS — Unsatisfactory Answering—*Committal—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 385.] *M.*, the bankrupt, and his wife were examined in the bankruptcy proceedings as to the ownership of

BANKRUPTCY—*continued.*

certain leasehold premises. It appeared that in the year 1913, prior to the adjudication, *M.* and his wife, in proceedings in the Chancery Division in connexion with an agreement for the sale by *M.* of the premises, had made affidavits in which they stated that the premises in question, which had been previously assigned by *M.* to his wife in consideration of her paying a mortgage debt on them, were held by the wife upon trust for *M.* subject to the amount paid by her on foot of the mortgage. In an action subsequently brought by *M.* against his solicitor for negligence in connexion with the sale, it was alleged in the statement of claim that at the date of the assignment by *M.* to his wife it was verbally agreed that she should hold the premises in trust for *M.* subject to the amount paid by her on foot of the mortgage. On the examination in bankruptcy, *M.*, in answer to questions put to him by counsel for the assignees in bankruptcy, swore that the premises were his wife's property. He at first denied that he had sworn the affidavit in the proceedings in the Chancery Division, but when it was produced he admitted his signature to it, but said that he had never read it. His wife when examined swore that the premises were hers. When examined as to the affidavit made by her, she said that she was lying sick in bed when she signed it, and that nothing was read to her but a few lines. The judge in bankruptcy made an order committing the bankrupt and his wife for unsatisfactory answering. *Held*, by the Court of Appeal (O'Brien L.C. and Molony L.J., Ronan L.J. dissenting), that the answering of the bankrupt and his wife was not unsatisfactory within the meaning of s. 385 of the Irish Bankrupt and Insolvent Act, 1857, and that the order for committal should be discharged. *Held*, by Ronan L.J., that the evidence of the bankrupt and his wife as a whole was characterized by such fencing and shuffling that the judge was entitled to consider it unsatisfactory, and was justified in making the

BANKRUPTCY—*continued.*

order of committal. What amounts to unsatisfactory answering within the meaning of s. 385 of the Irish Bankrupt and Insolvent Act, 1857, considered. *In re M'Loughlin.*
App. 583 [Rev. H.L.]

1. BANKRUPTCY—DEBTOR'S SUMMONS—Practice—Debtors out of the Jurisdiction—*Substitution of Service—Jurisdiction—Trader.*] Goods were supplied by *F.* to *M.*, a trader carrying on business in Ireland. *M.* sold his business, and left to reside in Scotland, entrusting the collection of his book-debts to his solicitor, *R. F.* obtained an order for substitution of service on *R.* of a writ of summons in an action to recover the debt, and subsequently obtained judgment for the debt and costs against *M. F.* then issued a debtor's summons, and obtained an order from the Court of Bankruptcy for leave to substitute service of the summons on *R.*, which was done, and *M.*, not having complied with the debtor's summons, was adjudicated a bankrupt. On an appeal from an order of Boyd J., disallowing the cause shown by *M.*, against the adjudication: *Held*, that as *M.* was neither carrying on trade nor resident in Ireland, there was no jurisdiction to order substituted service of the debtor's summons, and that the adjudication should be annulled. *In re Murray* - - - - - App. 554

2. BANKRUPTCY—DEBTOR'S SUMMONS—Right to go behind Judgment—*Judgment against Debtor on Contract made during Infancy.*] *Y.*, in an action tried before a jury, obtained judgment against *M.* for £65, the price of a horse sold to *M.* while an infant. *M.* had pleaded infancy in his defence, but had withdrawn the plea at the trial, and fought the case on the ground that the transaction was one of hiring, not of sale. *Y.* subsequently issued a debtor's summons against *M.* for payment of the amount of the judgment and costs. The Judge in Bankruptcy, being of opinion on the evidence before him that the horse was not a necessary, dismissed the debtor's summons. *Held*, by the Court of Appeal, that the Court of Bankruptcy had power to go behind the judgment, and inquire into the consideration; and there being evidence before the judge entitling him to find that the horse was not a necessary, he was right in dismissing the debtor's summons. *Ex parte Kibble*; *In re Onslow*, L. R. 10 Ch. 373, applied. *In re Newey*, 107 L. T. 832, distinguished. *In re Mead* - - - App. 285

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CONTRACT — CONSTRUCTION — Reference to prior Document—*Building Contract—Right to refer to Tender not incorporated in Contract — Architect's Certificate — Certificate, work completed with exception of a Wall—Wall held not to be included in Contract—Sufficiency of Certificate.* The respondents had adopted a scheme for the erection of artisans' dwellings, and had, for the purpose of obtaining tenders, prepared a specification with a form of tender attached. The appellant sent in a tender on the form attached to the specification, and his tender was accepted. Subsequently, a contract under seal was entered into between the appellants and the respondents. This contract, after reciting the tender, the specification, and certain drawings, and expressly incorporating the specification and drawings, provided that the works should be constructed agreeably to the specification and drawings. *Held*, the contract being unambiguous in itself, that the tender could not be referred to for the purpose of showing that a certain wall at the rear of the dwellings was included in the work to be done. The contract provided for a certain amount of the contract price being retained by the respondents until their architect had given his certificate of the satisfactory completion of the contract; and also that any disagreement connected with the quality of the materials, execution of the works, or meaning of the plans should be decided by the respondents' architect, whose decision should be final. The specification provided that the respondents' architect should be the sole arbitrator between the council and the contractor as to the quality of the materials and workmanship, or any other matter, should a dispute arise, and that his decision should be final. The respondents' architect had given a certificate that the appellant had completed the contract to his satisfaction, with the exception of building the wall in question. *Held*, a sufficient certificate to entitle the appellant to recover. *Kinlen* v. *Ennis Urban District Council.* [H. L. 299.

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FALSE IMPRISONMENT — Workman in Factory—*Hours of Employment—Quitting Work before End of—Gate of Factory locked—Refusal of Employer to give Facilities for leaving Factory—* Volenti non fit injuria.] Under sect. 150 of the Factory and Workshop Act, 1901, and the Defence of the Realm (Consolidation) Regulations,

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1914, as amended by article 6 A of the Order in Council, 1915, the defendant, the owner of a factory, extended, with the sanction of the Home Secretary, the working hours in the factory by one half hour in the evening, and accordingly the period of employment ran from 6 a.m. to 6.30 p.m. A fortnight before the intended change was to have come into operation, notice to that effect was posted in the factory, and was seen by the plaintiff, one of the workers. The plaintiff gave no notice of his intention to leave the employment. During working hours the yard gate of the factory was always kept locked, and no worker could leave the premises during those hours without a pass. When the new regulation came into force, the defendant gave instructions that the yard gate was to be kept locked till 6.30 p.m. The plaintiff came to work as usual. He came out of the factory at 6 p.m., and demanded to be let out. The defendant refused to allow the gate to be opened, and the plaintiff was detained until 6.30 p.m. The plaintiff brought an action to recover damages for false imprisonment by the defendant. *Held*, that it was a term of the employment, accepted by the plaintiff, that he should remain at work until 6.30 p.m.; that although the defendant might not be entitled to interfere actively to prevent his leaving before that time, he was not bound to afford facilities to him for doing so; and that the facts proved did not constitute false imprisonment. *Herd* v. *Weardale Steel, Coal, and Coke Company, Ltd.*, [1915] A. C. 67 applied. *Burns* v. *Johnston* [K.B. 444

1. **FOOD AND DRUGS — SALE — Indian Meal for human Food**—*Extraction of Natural Oil —Nature, substance, and quality demanded—Prejudice of the Purchaser—Commercial Usage—Sale of Food and Drugs Act,* 1875 (38 & 39 *Vict. c.* 63), *s.* 6.] For about twenty years past there had been sold throughout Ireland in large quantities, as Indian meal for human food, a preparation derived from genuine pure crushed Indian corn, by removing "offal"—i.e. all foreign matter such as husk, bran, and woody fibre—and lastly, the germ of the corn, and with it more than half the natural oil contained in the berry. The public preferred this refined preparation for human food, but they were generally ignorant of its composition and nutritive value. The unrefined Indian meal, used principally as cattle-food, is more nutritious; but the normal man would not eat it if he could get the refined preparation, as the latter is far more palatable, and also keeps longer. The appellant, a shopkeeper, was prosecuted for having sold to the prejudice of a purchaser Indian meal, deficient in natural oil to the extent of at least 62 per cent. The purchaser had required the meal for human food, and had been supplied with the refined meal:—*Held*, that the article sold was of the nature, substance, and quality demanded, notwithstanding the removal from it of more than half the natural oil; that the sale was not to the prejudice of the purchaser; and that no offence had been committed under s. 6 of the Sale of Food and Drugs Act, 1875. *Hughes* v. *Traynor*; *M'Neill* v. *Carson & Co.* - - K. B. 275

2. **FOOD AND DRUGS—SALE—Milk not of the Quality demanded**—*Sale by Contractor of New Milk deficient in quantity of Milk Fat contracted for—Article not of "nature, substance, and quality" demanded—Sale of Food and Drugs Act,* 1875 (38 & 39 *Vict. c.* 63), *s.* 6; *Sale of Food and Drugs Amendment Act,* 1879 (42 & 43 *Vict. c.* 30), *s.* 2—*Meaning of "nature," "substance," and "quality" considered.*] The effect of s. 2 of the Sale of Food and Drugs Amendment Act, 1879, is that in s. 6 of the Sale of Food and Drugs Act, 1875 (2), the words "nature, substance, and quality" are to be read distributively, and a penalty is incurred under that section if the article sold, although unadulterated, is not of the quality demanded. The respondent had contracted to sell to the appellants new milk containing not less than 3 per cent. of milk fat. Some of the milk supplied contained less than this proportion. *Held*, that the respondent was liable to a penalty, although the milk was supplied in the same state as that in which it came from the cow. *Belfast Guardians* v. *Jones* - - - K. B. 269

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GAMING—*continued.*

the purpose of unlawful gaming being carried on therein. The game played was called "House." The nature of the game and the manner in which it was played were described as follows:—In a large room off the hall of the club were 100 men, seated on forms at tables. Rectangular leather cards, each containing three horizontal rows with five figures in each row, were distributed amongst the men at the rate of one penny per card. Sometimes as many as forty dozen of these cards were issued in a game. From a box or urn, "the president," the respondent in this case, drew a card and called out its number, whereupon any player upon whose card the number was, crossed that number out with a piece of chalk. The game finished by a player shouting "House," walking up to "the president," and showing him his card, for which he (the player) claimed "House," so claiming from the fact that all the five numbers on one horizontal row were chalked out. In this particular case the winner was handed twenty-seven shillings, one penny to the shilling having been deducted by "the president," for the lighting, &c., of the hall. *Held*, that the game of "House" was a lottery, and as such was prohibited by the Lottery Acts, and that the playing of it, whether in public or private, was "unlawful gaming" within the meaning of section 4 of the Gaming Houses Act, 1854. *Per* Cherry L.C.J.: The game of "House" carried on as described was "unlawful gaming," not only because it was a lottery, but because it was a game of pure chance carried on for a pecuniary profit to the owners of the hall. *Barrett* v. *Flynn* - K. B. 1

GUARANTEE—**Defence of non est factum**—*Honest belief, without negligence, that Document was of different Nature—Belief not induced by fraud.*] The defendants signed a document purporting to be a guarantee, in the honest belief that it was a document of a wholly different nature, the mistake not being due to any negligence on their part. *Held*, that they were not bound by the document, although there was no evidence that their signatures had been obtained by fraud. *Bank of Ireland* v. *M'Manamy*. [K.B. 161

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HUSBAND AND WIFE — MARRIAGE — *Nullity of Marriage — Impotence of Husband — Decree of Nullity—Marriage void* ab initio—*Right of Wife to recover Money Paid in Consideration of Marriage — Money spent by Husband — Money applied by Husband to pay off Charge on his Lands —Merger—Right of Wife to stand in shoes of Chargeant paid off.*] Where a decree of nullity of marriage is pronounced by the Court on the ground of the impotence of one of the parties, the marriage is null and void *ab initio*. Prior to, and in contemplation of, an intended marriage between the plaintiff, then *M. M'D.* (the intended wife), and the defendant, *T. P.* (the intended husband), a sum of £475 was paid by the plaintiff to the defendant as her marriage portion, and it was agreed that £400 of this sum should be applied in paying off a charge of that amount on the defendant's lands. A ceremony of marriage subsequently took place between the plaintiff and the defendant. Shortly after the ceremony the defendant paid off the charge of £400 out of the £475. The balance of that sum was spent by him while the plaintiff and defendant were living together. Some years after the ceremony the plaintiff presented a petition to the King's Bench Division (Matrimonial) asking for a declaration of nullity of marriage on the ground of the impotence of the defendant. She subsequently issued the writ in the present action, describing herself as *M. P.* and a married woman, and claiming to recover the sum of £475 as money received by the defendant for her use, a claim being subsequently added that the plaintiff was entitled to a charge on the defendant's lands for £400. After the issue of the writ, but before the action came on for trial, an order was made by the King's Bench Division declaring that the form of marriage "was and is null and void," on the ground of the impotence of the defendant. The plaintiff then, by leave of the Court, amended the writ of summons by describing herself as *M. M'D.* and a spinster. *Held*, by the Court of Appeal, affirming the decision of the King's Bench Division, that the plaintiff was entitled, as upon a consideration that had failed, to be repaid by the defendant the sum of £400, and was entitled to stand in the place of the chargeant whose charge upon the defendant's lands had been paid off, and that the plaintiff had a good charge on the said lands for the said sum of £400. *Held* also, that as the effect of the decree of nullity was to make the marriage void *ab initio*, the plaintiff was to be treated as having been a *feme sole* at the date of the issue of the writ, and that the amendment of the writ was properly allowed. *Held*, by the King's Bench Division, that as regarded the sum of £75 paid to and expended by the defendant while the plaintiff lived with him as his wife, this

HUSBAND AND WIFE—*continued.*

was a concluded transaction which ought not to be disturbed. *P.* v. *P.* (*by amendment M'D.* v. *P.*) [K.B. 400; App. 414

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—— **Custody** — *Habeas Corpus — Father and Mother of different Religions—Discretion of Court to refuse Custody to Father—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 5.] *S.*, who was a Roman Catholic, married in the year 1903 in a Protestant church a woman who was a Protestant. He promised at the time of the marriage to adopt his wife's religion. There were two children of the marriage, and *S.* allowed them to be baptized and brought up as Protestants. From the year 1909 the children had lived with their mother, and been supported and educated by her, *S.* contributing nothing to their support or education, and living, at first with his sister, and afterwards becoming an inmate of a workhouse. In December, 1915, the children being then aged about 11 and 8 respectively, *S.*, being desirous that they should be brought up as Roman Catholics, demanded them from his wife, and this demand being refused, he applied for a writ of habeas corpus. He was at this time still an inmate of the workhouse, but had arranged for the children to be maintained and educated in Roman Catholic charitable institutions. *Held*, that the writ of habeas corpus should not be granted. Effect of s. 5 of Guardianship of Infants Act, 1886, considered. *In re Story* - - - - - K. B. 328

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INTENT — To defeat or delay creditors — Departure from dwelling-house 534
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JURISDICTION—Bankruptcy—Debtor out of jurisdiction - - - - - 554
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JUSTICES—JURISDICTION—Order authorizing entry on lands for Road material [313, 320, 573, 579
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——— Property in possession of Police—Delivery of - - - - - - - 616
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LAND LAW ACTS—FAIR RENT—Estoppel — Agreement fixing Fair Rent — *Non-agricultural Holding — Expiration of Statutory Term—Notice to Quit—Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 8, *sub-s.* 6—*Land Law* (*Ireland*) *Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 3, *sub-sec.* 1.] In the year 1884 an agreement and declaration fixing a fair rent, made between the landlord and tenant of a holding, was filed in the Irish Land Commission Court pursuant to s. 8 of the Land Law (Ireland) Act, 1881. At the time of the filing of the agreement the holding was not agricultural or pastoral, or partly agricultural and partly pastoral, within the meaning of the Act. There had been no further fixing of a fair rent. A successor in title of the landlord brought an ejectment founded on notice to quit to recover possession of the holding. *Held*, that the agreement and declaration precluded the landlord and his successors in title from objecting that the holding was not at the time agricultural or pastoral, or partly agricultural and partly pastoral; and that, although the statutory term had expired, the tenant was protected by s. 3 of the Land Law (Ireland) Act, 1896, from having the tenancy determined by notice to quit. *O'Connor* v. *O'Connor* - - - - - K. B. 148

LANDLORD AND TENANT—Determination of Tenancy by Disclaimer—*Evidence of such Disclaimer—Form of Vesting Order made in pursuance of sect.* 79 *of the Irish Land Act*, 1903—*Powers of the Irish Land Commission exercisable in the name of the Commission by the Estates Commissioners—Effect of such Vesting Order.*] A tenancy to which the provisions of the Irish Land Acts apply may be determined by disclaimer on the part of the tenant. A claim to have acquired the fee-simple interest in the lands by the operation of the Statutes of Limitation amounts to such a disclaimer. A vesting order made in the name of and under the seal of the Irish Land Commission, and signed by two of the Estates Commissioners, complies with the provisions of sect. 79, sub-s. 1, of the Irish Land Act, 1903. *Congested Districts Board* v. *Connor.* - K. B. 611

LOCAL GOVERNMENT—ASYLUM OFFICERS—Superannuation Allowance—*Dispute—Decision by Lord Lieutenant—Finality of Decision—Mandamus to enforce—Asylum Officers' Superannuation Act*, 1900 (9 *Ed.* 7, *c.* 48), *s.* 2 (1), *ss.* 15, 19.] In deciding a dispute under sect. 15 of the Asylum Officers' Superannuation Act, 1909 (2), as applied to Ireland by sect. 19, the Lord Lieutenant acts in an administrative and not in a judicial capacity, and his decision, whether given in writing or orally, is binding on the Court as a final determination of the matter in dispute. *R.* (*Carroll*) v. *the Committee of Armagh District Lunatic Asylum* (1).] - - - K. B. 184

1. LOCAL GOVERNMENT—ROADS—Road Materials—*Order authorizing Road Authority to enter on Lands not in Occupation of Person from whose Lands the Road Materials are to be taken—Grand Jury (Ireland) Act,* 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] Justices have no jurisdiction under s. 162 of the Grand Jury (Ireland) Act, 1836, to make an order authorizing a road authority to enter on the lands of *A* for the purpose of obtaining road materials from a quarry on the lands of *B*, although the only convenient access to such quarry from the public road is through the lands of *A*. *R.* (*Horey*) v. *The Justices of King's County* - - - - K. B. 573; App. 579

2. LOCAL GOVERNMENT—ROADS—Road Materials—*Order to enter Land to dig for Road Materials—Orchard—"Orcharding out"—Necessity of proof by Applicant that Land is not an Orchard—Certiorari—Conclusiveness of Decision of Justice that Land is an Orchard—Grand Jury (Ireland) Act,* 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162.] The prosecutor, a road contractor, applied to a magistrate at petty sessions for an order under s. 162 of the Grand Jury (Ireland) Act, 1836, to enter a field in the occupation of *D.*, and dig for and carry away road materials. He gave evidence that these materials could not conveniently be procured elsewhere. *D.* gave evidence to show that the field was an orchard, fruit-trees having been planted on it by him some time before the application, admittedly with the object of preventing an order to enter being made. The magistrate held on the evidence that the field was an orchard, and made an order, "Application refused, without costs." The prosecutor applied for a writ of certiorari to quash this order on the ground that the field was not an orchard, and that *D.*, in planting portion of the field, did not bonâ fide intend to create an orchard. *Held*, by the King's Bench Division (Cherry L.C.J., and Madden J.), that the certiorari should be refused. *Per* Cherry L.C.J., on the ground that certiorari did not lie to quash an order of dismissal by justices. *Per* Madden J., on the ground that the magistrate had rightly decided that the field was an orchard. *Held*, by the Court of Appeal, affirming the order of the King's Bench Division, that the certiorari should be refused, on the ground that the magistrate having heard the evidence and determined the question of fact that the field was an orchard, there was no jurisdiction to review his determination. *The Queen* v. *Dayman*, 7 E. & B. 672, applied and followed. To justify the making of an order to enter land under s. 162 of the Grand Jury (Ireland) Act, 1836, the applicant must satisfy the justices that the land does not come within the class excepted by the section, viz., a deer-park, bleach-green, orchard, &c. *Reg.* (*Murphy*) v. *Justices of Wexford*, [1894] 2 I. R. 81, approved of. *R.* (*Darcy*) v. *The Justices of County Carlow* - - K. B. 313; App. 320

LOCAL GOVERNMENT—*continued.*

LORD LIEUTENANT OF IRELAND in settling dispute under Asylum Officers' Superannuation acts administratively [184
See Local Government — Asylum Officers.

LOTTERY.—Game of "House" - 1
See Gaming.

MANDAMUS—Asylum Officers' Superannuation Act—Decision of Lord Lieutenant—Finality of - - - - 184
See Local Government — Asylum Officers.

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See Vaccination Acts.

1. MASTER AND SERVANT — WORKMAN'S COMPENSATION—Average Weekly Earnings—*Workman in Employment for less than three Years—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *sched. 1, s.* 1, (*a*) (i)] Section 1, (*a*) (i), of the first schedule to the Workmen's Compensation Act, 1906, provides that, for the purpose of ascertaining the amount of compensation in case of death from injury, where the workman has not been in the employment of the same employer for the three years next preceding the injury, the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of actual employment under the same employer. Section 2 (*a*) provides that for the purposes of the provisions of the schedule, average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. In a claim for compensation under the Workmen's Compensation Act, 1906, by the dependants of a deceased workman, the only evidence of the earnings of the deceased was a pay-sheet which showed that he had been in the employment of the same employers for twenty-six weeks before his death, and that during that period his weekly earnings had varied, being over £1 in some weeks, and only a few shillings in others. *Held*, by the Court of Appeal (Ronan and Molony L.JJ., O'Connor M.R. dissenting), that for the purpose of ascertaining the amount of compensation under s. 1, (*a*) (i), of the first schedule to the Workmen's Compensation Act, 1906, the county court judge was bound to calculate the average weekly earnings of the deceased by dividing the total amount actually earned by 26, the number of weeks

MASTER AND SERVANT—*continued.*

worked, and was not at liberty in making the calculation to leave out of account weeks in which only a small sum appeared to have been earned. *Perry* v. *Wright* and *Bailey* v. *Kenworthy* [1908] 1 K.B. 441, considered. *Gill* v. *Grainger Bros.* - - - - - - APP. 354

2. **MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—Course of Employment**—*Accident arising out of and in—Injury on Public Street by falling Masonry—Compensation*—(6 *Edw.* 7, *c.* 58), *s.* 1.] A grocer's messenger in the course of his employment was walking on the pavement of a thoroughfare in Dublin, when the parapet of a house which he was about to pass collapsed, and the workman was killed by the falling masonry. Dependants of deceased claimed compensation from the employer. *Held*, that the death was not caused by accident arising out of the employment. In such a case the test to be applied is that laid down in *Collins* v. *Collins*, [1907] 2 I. R. 104, namely, whether the accident was one "the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it." *Cooper* v. *Healy* - - - - - APP. 33

3. —— **WORKMEN'S COMPENSATION—"Payment allowance, or benefit"**—*Compensation for Injury received by workman from employer during incapacity—Pension under Superannuation Acts — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *sch.* 1, *clause* 3. A workman, by the terms of his employment, came within the provisions of the Superannuation Acts as to pensions. He sustained an injury from an accident arising out of and in the course of his employment, and was retired from his employment on a pension granted by the Treasury under the Superannuation Acts. *Held*, by the H.L., reversing the C.A., that the amount of this pension was to be taken into account in determining the amount of compensation to be awarded to the workman under the Workmen's Compensation Act, 1906 - - - - APP. 193; H.L. 572

MEMBER OF PARLIAMENT—Salary of
See BANKRUPTCY—SALARY. [285

MILK—Deficient in Fat - - - - 269
See FOOD AND DRUGS—SALE. 2.

MISTAKE as to nature of document—Defence of non est factum - - - - 161
See GUARANTEE.

MONEY PAID IN CONSIDERATION OF MARRIAGE—Recovery of—Nullity of marriage - - - - - 400, 414
See HUSBAND AND WIFE—MARRIAGE.

MUNICIPAL PURPOSES — Hereditaments used for Public Purposes - - 77
See POOR RATE—EXEMPTION.

1. **NATIONAL INSURANCE — Employed Contributor**—*National Insurance Acts*, 1911 *to* 1913 (1 & 2 *Geo.* 5, *c.* 55; 3 & 4 *Geo.* 5, *c.* 37)—*Crier of Recorder's Court and of County Court.*] The crier of a Recorder's Court, or County Court, is not employed under a contract of service with the Recorder or county court judge, and the Recorder or county court judge is therefore not liable to contribute in respect of such employee under the provisions of the National Insurance Acts, 1911 to 1913 (2). The nature of the office of crier considered. *Irish Insurance Commissioners* v. *Craig* - - - - - - - - - 59

2. **NATIONAL INSURANCE — Employed Contributor**—*Assistant Schoolmaster in National School—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55).] An assistant teacher in a national school adopted by the Commissioners of National Education who enters into a contract of employment with the manager of the school is an employed contributor within the meaning of the National Insurance Act, 1911; and the manager of the school, notwithstanding that the teacher's salary is paid by the Commissioners of National Education, and not by him, and that the education in the school is controlled by the regulations of these Commissioners, is the employer of the teacher within the meaning of the Act. *Fletcher Moore* v. *Irish Insurance Commissioners* - - K. B. 70

NATURE, SUBSTANCE, AND QUALITY—Sale of Food and Drugs - - 269
See FOOD AND DRUGS—SALE. 1 and 2.

NEGLIGENCE—Contributory Negligence—*Direct Cause of Accident—Possibility of Defendant's avoiding the Accident by Exercise of reasonable Care—Joint Negligence of Plaintiff and Defendant.*] The plaintiff, a partially deaf man, in crossing a thoroughfare was knocked down and injured by a tram-car. The driver, previous to the accident, sounded the gong and shouted, but did not slacken speed. The jury found that the plaintiff was negligent in not keeping a proper look-out, but that the driver by reasonable care could have avoided the consequences of the plaintiff's negligence. They also found that the accident was not directly caused exclusively by the negligence of the plaintiff, or exclusively by the negligence of the driver, but was directly caused by the negligence of both concurrently; and they assessed a sum for damages. *Held* by the Court of Appeal (reversing the decision of the King's Bench Division), that on the findings of the jury the plaintiff was entitled to judgment for the damages assessed. *Gaffney* v. *The Dublin United Tramways Co.* - - K. B. 472; APP. 476

NULLITY OF MARRIAGE—Right of wife to recover money paid in consideration of marriage - - - - 400, 414

See Husband and Wife—Marriage.

ORCHARD—Entry on Land—road material—necessity for proof by Applicant that Land not an Orchard - - 313

See Local Government—Roads. 2.

PENSION under Superannuation Acts to be taken into account in awarding compensation under Workmen's Compensation Act - - - - 193, 572

See Master and Servant—Workmen's Compensation 3.

POLICE—Property in the hands of—Order for delivering to owner - - 616

See Criminal Law—Practice.

POOR RATE — EXEMPTION — Hereditaments of a "Public Nature" *"Used for Public Purposes"—Hereditaments used for Municipal purposes—Hall erected and maintained at expense of Borough Fund—Baths and Wash-houses erected under provisions of Baths and Wash-houses Act,* 1846 (9 *&* 10 *Vict. c.* 87)—*Poor Relief (Ireland) Act,* 1838 (1 *&* 2 *Vict. c.* 56), *s.* 63—*Valuation (Ireland) Act,* 1852 (15 & 16 *Vict. c.* 63), *s.* 16.—*Valuation (Ireland) Amendment Act,* 1854 (17 *&* 18 *Vict. c.* 8), *s.* 2. Hereditaments used for municipal purposes merely are not hereditaments of a public nature within the meaning of the Valuation (Ireland) Amendment Act, 1854, so as to be exempt from assessment for poor rate. The Corporation of Cork had erected a hall which was maintained at the expense of the borough fund. The use of the hall was given for public meetings at a nominal charge, and for concerts, &c., for which a charge was made, but no profit was made out of the lettings. The hall was also sometimes used for meetings of the county borough. The Corporation of Cork had also erected swimming-baths under the provisions of the Baths and Wash-houses Act, 1846. The baths were maintained at the expense of the borough fund, and all receipts from them were paid into the borough fund. The expenditure exceeded the receipts. No member of the public could as of right use the baths, but any member of the public who complied with the by-laws was permitted to use the baths no matter where he resided. *Held,* by the Court of Appeal, reversing the decision of the King's Bench Division, that the hall and the baths were not hereditaments of a public nature and used for public purposes so as to be exempt from poor rate. *The Corporation of Cork* v. *Commissioners of Valuation*
[K. B. 77: App. 95

POOR RATE — PROCEDURE—Turbary—No Appeal from Valuation or Rate—*Claim for Rates—Defence—Exemption from Rateability—Conclusiveness of Rate—Valuation (Ireland) Act,* 1852 (15 & 16 *Vict. c.* 63), *s.* 12.] A right of taking turf may be a separate rateable hereditament, apart from the lands upon which it is exercised. There is jurisdiction under the Valuation Act, 1852 (15 & 16 Vict. c. 63), s. 12, to make a separate valuation of turbary. *Held,* without deciding whether the turbary in the present case was or was not liable to rates, that as the defendants had not appealed from the valuation or from the striking of the rate, they could not, by way of defence to an action for rates, raise any question as to the correctness of these decisions. *Whaley* v. *The Great Northern Railway Co. of Ireland,* [1913] 2 I. R., followed. *Stevenson* v. *Orr and Others* - - - - K. B. 619

POSSESSION—Sufficient to maintain trespass

See Trespass to Land. 1. [27

PRACTICE — CERTIORARI — Civil-bill decree for over £20—*Removal into High Court—Civil-bill Procedure Amendment Act,* 1864 (27 & 28 *Vict. c.* 99), *s.* 9.] Where a year has elapsed from the date of a civil-bill decree, and it has not been renewed, it cannot be removed by certiorari into the High Court under s. 9 of the Civil-bill Procedure Amendment Act, 1864. *Rutherford* v. *Mulligan* - - - - - K. B. 31

PRACTICE — SECURITY FOR COSTS — New Trial Motion—*Supervening Insolvency—Time for making Application—Delay in Applying.*] On the 14th May, 1915, a verdict and judgment were entered for the plaintiff in an action. On the 9th June notice of motion for a new trial was served by the defendant, and but for the heavy list the case might have been disposed of in the Trinity Sittings. On the 27th October the case appeared in the list, but on the application of the plaintiff it was adjourned for his convenience. On the 30th October the plaintiff received a circular, dated the 28th October, informing him that the defendant had made an assignment of his property for the benefit of his creditors. *Held,* that an application by the plaintiff that the defendant be ordered to give security for costs ought, in the circumstances, to be refused. *Porter* v. *Kirtlan.*
[K. B. 13

PRACTICE—SERVICE out of the Jurisdiction — *Notice of Motion for liberty to issue Execution under Order XLII, rule* 24—*Notices under Courts (Emergency Powers) Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 78).] Leave may be given to serve out of the jurisdiction a notice of motion for liberty to issue execution under Order XLII, rule 24 (*a*),

PRACTICE—*continued.*

six years having elapsed since the judgment, and there having been a change in the parties. Leave may also be given to serve out of the jurisdiction the necessary notices required by the Courts (Emergency Powers) Act, 1914. *Donohoe* v. *Flavelle* - - - - - - K. B. 192

PROBATE — PRACTICE — Impounding Grant — *Injunction.*] The King's Bench Division, in the exercise of its probate jurisdiction, will not make an order directing that a grant of probate to an executor shall be impounded when made, nor will it grant an injunction restraining an executor named in a will from dealing with the assets after a grant has been made, even though it is stated that the assets will be in jeopardy if a grant of probate is made to the executor. The proper remedy is to institute proceedings for administration in the Chancery Division, and then apply in that Division for an injunction and a receiver. *In the Goods of Moxley* - - - - K. B. (Prob.) 145

PROPERTY — In possession of Police — Delivery of - - - - - - 616
See Criminal Law—Practice.

PROPERTY PASSING ON DEATH — Settled Property - - - - 456
See Revenue—Estate Duty.

REVENUE — ESTATE DUTY — Settled Property — *Prior voluntary Charges — Property passing on Death — Valuation of Annuities and Charges—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 7 (1) (*a*).] Under settlements executed in 1887 and 1901, *A* was tenant for life of certain lands. Prior to the execution of the first of these settlements, *A*, who was then owner in fee, charged the lands by voluntary deeds with annuities in favour of his brothers and sister, reducible in case of bankruptcy or attempted alienation, and with sums in gross as portions for the children of his brothers and sister payable on the expiration of the annuities. The settlements were expressly declared to be subject to the charges created by these deeds. *Held*, that the property which passed on the death of *A*, so as to be subject to estate duty, consisted of the hereditaments comprised in the settlements, diminished by the value of the annuities and sums in gross; and that these annuities and sums, although created without money consideration, were not incumbrances in respect of which allowance was prohibited by s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C. 198, applied. *Per* Cherry, L.C.J., s. 7, sub-s. 1, of the Finance Act, 1894, applies only to unsettled or free property passing, on death, by will or intestacy. *Held* also, that the annuities and sums in gross should be valued actuarially, subject to the provisions contained in the several deeds creating them. *Lord de Freyne* v. *Inland Revenue Commissioners* - - - K. B. 456

REVENUE — UNDEVELOPED LAND DUTY—Deduction in respect of Expenditure in Development—*Finance* (1909-10) *Act*, 1910 (10 *Ed.* 7, *c.* 8), *s.* 16, *sub-s.* 2 (*b*).] The owner of land, the subject of a scheme for land development, and within the borough boundary of a city corporation, arranged with the corporation that they should take over and make a road, existing on the land and prior to the arrangement a private road for the upkeep of which the owner of the land was liable, on condition that he dedicated for the purpose of the road a margin 10 feet in width. *Held*, that in assessment for undeveloped land duty the owner, having by his bargain purchased the labour of the corporation, was entitled to allowance in respect of the "site value" as having "incurred expenditure" on the road within the meaning of sect. 16, sub-s. 2 (*b*), of the Finance (1909-10) Act, 1910 (10 Ed. 7, c. 8), which Act does not interfere with the power of a landowner to make bargains with respect to "site value" (*per* Palles C.B.). *Inland Revenue Commissioners* v. *Lemon* - - - - - - K.B. 175

ROAD MATERIALS—Order to enter land for [313, 320, 573, 579
See Local Government—Roads. 1 and 2.

RULES AND ORDERS—Or. XLII, r. 24—Leave to issue Execution on judgment more than six years old - - 192
See Practice—Service.

SALARY—Of Member of Parliament—Available for creditors - - - - 285
See Bankruptcy—Salary.

SECURITY FOR COSTS - - - - 13
See Practice—Security for Costs.

SERVICE — Substitution of debtor summons — Debtor out of jurisdiction—Not carrying on trade in Ireland—Jurisdiction [App. 554
See Bankruptcy—Debtor Summons. 1.

SERVICE OUT OF THE JURISDICTION—Notice under Courts Emergency Powers Acts - - - - - - 192
See Practice—Service.

SHIP—CHARTER-PARTY — Demurrage— "*Reporting Day*"—*Report to Customs Authorities or Consignees?—Arrived Vessel—Port—Stowage—Alleged Negligence.* A vessel with a cargo of wheat for the port of Cork for the endorsees of two bills

SHIP—*continued.*

of lading was, according to the charter-party, to be discharged at the rate of 450 tons per day, Sundays and holidays excepted, "reporting day not to count." By the charter-party the master was required to report to charterers, or their agents, immediately on arrival of the vessel at port of discharge, and enter the vessel at the Custom House in their name. The holders of bills of lading were entitled to name the discharging docks, provided they did so as soon as the arrival of the vessel was notified to the charterers' agents by the master. For each day's detention beyond the lay days required under the stipulated conditions, demurrage was to be paid by the charterers or their agents at a fixed rate. The wheat, together with another consignment for Glasgow, was loaded in pursuance of directions given by the charterers, and the manner of stowage confined the discharge of the Cork consignees' part of the cargo to two hatches instead of from all the hatches. This restriction in the facilities caused delay in the discharge. The vessel reached Queenstown, within the geographical limits of the port of Cork, on the 20th of December, 1914; and on the following day the master and ship's agent reported to the Customs authorities that she was then lying at South Deep-Water Quay, Cork, which as a matter of fact she did not reach till the 22nd of December. On the latter date the master notified the consignees that the vessel was moored in a discharging berth, ready to discharge, and that "reporting day was done yesterday at the Custom House as per charter-party." The discharge of the ship began on the 23rd of December, and was not finished until the 6th of January, 1915. Under the conditions prescribed by the charter-party the discharge should have been completed within eight working days. The shipowners brought an action for demurrage. *Held*, that the vessel did not reach the commercial area of the port of Cork till the 22nd of December, and that "reporting day" in the charter-party referred to a report of the vessel to the consignees as an arrived vessel effectively placed at their disposal and prepared to allow discharge; and that inasmuch as such report was not made until the 22nd of December the latter day was excluded from the number of lay days. *Held* also, that negligence in stowage could not be attributed to the shipowners, the mode of stowage having been directed by the shippers, who were entitled to give such directions. *Ohrloff* v. *Briscall* (L. R. 1 P.C. 231) and the judgment of Dr. Lushington therein discussed. *Larrinaga Steamship Company, Limited,* v. *Green & Co.* - - - - K.B. 126

SHIP—FACTORY—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 84, 104—*Regulations of Secretary of State imposing Obligations on Owner of Ship—Ultra Vires—Power of Court to question Validity of Regulations—Fatal Accident—Negligence.*] Section 79 of the Factory and Workshop Act, 1901, provides that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in factories is dangerous to life or limb, he may certify it to be dangerous, and thereupon may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable, and to meet the necessity of the case. By sect. 84 the regulations are to be laid before both Houses of Parliament, and if either House within forty days resolve that all or any of the regulations ought to be annulled, the regulations shall, after the date of the resolution, be of no effect, without prejudice to the validity of anything done in the meantime thereunder. Sect. 104, sub-s. 1, enacts that the provisions of the Act with respect to (*inter alia*) dangerous trades "shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents or workmen, uses any such machinery or plant for the before-mentioned purpose were the occupiers of the premises; and for the purpose of the enforcement of these provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof, and the person so using such machinery or plant shall be deemed to be the occupier of a factory." Sub-s. 2 enacts that for the purposes of the section the expression "plant" includes any gangway or ladder used by any person to load, unload, or coal a ship. The Secretary of State, purporting to act under the powers conferred on him by the statute, had certified the processes of loading and unloading any ship in any dock, harbour, or canal to be dangerous, and had in the year 1904 made regulations which provided that it should be the duty of the owner, master, or officer in charge of a ship to comply with Part II of the regulations. One of the regulations in Part II provided that if a ship was lying at a wharf or quay for the purpose of loading or unloading, there should be means of access for the use of persons employed at such times as they have to pass from the ship to the shore, or from the shore to the ship, as follows:—Where a gangway is reasonably practicable, a gangway not less than twenty-two inches wide, properly secured and fenced. The defendants were the owners of a ship lying in a river and discharging a cargo at a quay. The

SHIP—*continued.*

SHIP—*continued.*

plaintiff brought an action against the defendants under the Fatal Accidents Act, 1846, claiming damages arising from the negligence and breach of statutory duty of the defendants in not providing proper means of access to the defendants' ship, whereby the plaintiff's son was killed. The deceased had been hired by a stevedore employed by the consignees of the cargo to unload the ship, and was drowned in the course of the unloading. Access to the ship from the quay was by means of a ladder, admittedly in a dangerous condition when the accident occurred. The jury found that it was reasonably practicable to employ a gangway as a means of access from the shore to the ship; that the cause of the death of the deceased was the non-user of a gangway in accordance with the statutory requirements; that the direct cause of the occurrence was the neglect of the defendants to provide a reasonably secure and safe means of access to the ship; and they assessed damages for the loss sustained by the plaintiff. *Held*, by the Court of Appeal, affirming the decision of the King's Bench Division (Palles C.B. and Gibson J.; Cherry, L.C.J. dissenting), that the regulation in question imposing obligations on the owner of a ship was ultra vires and void, and that the defendants were entitled to judgment. *Held*, also, that it was competent for the Court to question the validity of the regulations. *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347, distinguished. *Mackey* v. *Monks* - - K. B. 200; App. 241

SITE VALUE. - - - - - 175
See Revenue — Undeveloped Land Duty, bargains with respect to, not prohibited by Finance Act (1909–10), - - - 175

SMALL DEBTS—Rent—Distress Warrant— ***Small Debts Act*** **(22** ***Vict. c.*** **14),** ***s.*** **5—*****Execution of, by Police—Constabulary (Ireland) Act,*** **1836 (6 *&* 7** ***Wm.*** **4,** ***c.*** **13),** ***s.*** **15—*****Petty Sessions (Ireland) Act,*** **1851 (14 *&* 15** ***Vict. c.*** **93),** ***s.*** **25.]** Where a decree for rent is obtained under the Small Debts Act (22 Vict. c. 14), and the warrant is addressed to the constabulary, the latter are bound to execute the warrant, notwithstanding the provisions of sect. 15 of the Constabulary (Ireland) Act, 1836, prohibiting the constabulary from levying rents by distress. So held by the Court of Appeal, affirming the decision of the King's Bench Division. *Rex* (*Whiteside*) v. *Justices of Belfast*, 46 I. L. T. R. 88, followed. *R.* (*Letterkenny Rural District Council*) v. *Regan.* [K. B., App. 393, 397.

STATUTES—

11 Anne, c. 6 (Ir.)—Lotteries. - 1
See Gaming.

STATUTES—*continued.*

27 Geo. 3, c. 35—Pursuit of Game—Evidence—Onus of proof of Consent - 180
See Trespass to Land. 2.

6 & 7 Wm. 4, c. 13, s. 15—Execution of Distress Warrant by Police. - 393
See Small Debts.

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1. TRESPASS TO LAND—Conflicting Claims —*Acts amounting to an Intention to assume Possession.* *B.* was the owner of a field let in conacre to the defendant on a letting expiring in November, 1914. *B.* sold the field to the plaintiff in April, 1915. The defendant continued to keep his cattle on it. In July, 1915, the plaintiff entered the field and cut down some trees. Two days afterwards he broke the lock on the gate of the field and entered and put his own cattle there. They were almost immediately afterwards driven off by the defendant. The plaintiff having subsequently brought an action against the defendant for trespass to the lands: *Held,* that the acts of the plaintiff showed that he intended to assume possession and did the acts in assertion of his right to possession, and that the plaintiff had thereby obtained a possession sufficient to entitle him to maintain trespass
Hegan v. *Carolan* - - - - K.B. 27

2. TRESPASS TO LAND in pursuit of Game —*Evidence of Absence of Authority or Permission—Onus of Proof*—27 *Geo.* 3, c. 35. The appellant, a gamekeeper, as a common informer prosecuted the respondent for trespass in pursuit of game under 27 Geo. 3, c. 35. Evidence was given that the respondent was found on the lands of *L,* to whom the game rights belonged, with a dog and gun, and that the respondent had shot a pheasant on *L*'s lands. The pheasant was illegally shot, as it was the close season. On being challenged, the respondent stated he had "the right to shoot there," and would do so again. *L.* was not called to disprove permission or authority to the respondent to enter the lands. The justices dismissed the complaint, holding that there was no evidence that the respondent had entered *L*'s lands without his authority. On a case stated: *Held,* that in such

TRESPASS TO LAND—*continued.*
prosecutions the whole circumstances might warrant an inference of want of authority from the occupier of the lands, even without direct evidence that such authority had not been given, and that there was evidence in the present case to support the complaint. Amongst other matters it could not be presumed that the occupier of the lands would authorize illegality, and the respondent's act in shooting the pheasant was admittedly illegal. *Quaere*, in a prosecution for trespass in pursuit of game, does the onus lie upon the prosecutor to negative the consent of the occupier of the lands, or upon the defendant to prove such consent? *Gleeson* v. *Hurley* - - K.B. 180

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VACCINATION ACTS—Neglect by Guardians to enforce—*Duty of Guardians—"May direct Proceedings"—Mandatory Operation of Words—Mandamus—Prosecutor—Powers of Local Government Board—Statute—Construction—"May" read "shall"—Vaccination Amendment (Ireland) Act*, 1879 (42 & 43 *Vict. c.* 70), *s.* 10. Sect. 10 of the Vaccination Amendment (Ireland) Act, 1879, provides that "the guardians of any union in Ireland may direct proceedings to be instituted for the purpose of enforcing obedience to the provisions of the Vaccination (Ireland) Acts." *Held*, that this provision is mandatory in its character, and imposes a duty upon the guardians, which can be enforced by mandamus, to take steps to put into operation the compulsory provisions of the Vaccination Acts within their district. *Held*, also, that the Vaccination Acts and the Poor Relief Acts are so closely connected that the power of control and supervision vested in the Local Government Board over guardians as regards their duties under the Poor Law Acts, extends to their duties under the Vaccination Acts, and that the Local Government Board is a proper relator in an application for a writ of mandamus commanding the guardians to enforce the provisions of the Vaccination Acts. *R.* (*Local Government Board*) v. *The Guardians of the Poor of Letterkenny Union* - K.B. 18

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THE END.